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Supreme Court, U.S.
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No. 09-09-496

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In The

Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether double jeopardy protects a defendant from the irreparable harm of successive prosecutions for the same wire fraud charges, scheme and conduct that the Fifth Circuit held were not criminal under the government's expansive view of the intangible right of honest services.

PARTIES TO THE PROCEEDING

Petitioner was a Defendant in the district court along with co-Defendants Daniel Bayly and Robert Furst in *United States v. Brown*, 571 F.3d 492 (5th Cir. 2009) [*Brown II*]. The district court granted Brown's motion for severance from his co-Defendants, found all Defendants' double jeopardy issues "non-frivolous," and stayed proceedings for interlocutory appeal to the Fifth Circuit. Bayly and Furst were Appellants in the Fifth Circuit, but they are not parties before this Court.

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INTRODUCTION

This petition presents another problem of statutory construction, Circuit conflict, and constitutional concern arising from the application of the federal wire fraud statutes to a private business transaction where the Defendant neither sought nor received any personal gain. The Circuits disagree over the scope, application and constitutionality of § 1343 (wire fraud) and § 1346 (honest services), which led this Court to grant *certiorari* in *United States v. Black*,[1] *United States v. Weyhrauch*,[2] and *United States v. Skilling*.[3] In *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000), this Court addressed the parallel mail fraud statute and held that the two phrases in § 1341 ("scheme or artifice to defraud" and "for obtaining money or property") constitute a single offense. However, with respect to §§ 1343 and 1346, this Court has not spoken, and the Circuits cannot agree on whether or when the statutes create one offense, two offenses, or, no offense at all. Because there is no uniform understanding of the boundaries of wire fraud –

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[1] 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009) (challenging application of § 1346 to private actor whose alleged scheme "did not contemplate economic or other property harm to the private party to whom honest services were owed").

[2] 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009) (challenging application of § 1346 to a public official).

[3] 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 77 U.S.L.W. 3645 (U.S. October 13, 2009) (No. 08-1394) (challenging application of § 1346 to the conduct of an Enron executive).

especially when "intangible rights" are implicated – Brown's Fifth Amendment rights have been compromised. The Fifth Circuit ignored fundamental principles and procedures of double jeopardy jurisprudence and wrongfully approved a second prosecution of Brown on the same wire fraud charges, conduct, and scheme that the Fifth Circuit held did not constitute an "honest services" crime. *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) [*Brown I*]. Brown's case exemplifies another unconstitutional consequence of the ambiguity and confusion surrounding the wire fraud offense and the prosecutorial overreaching that has plagued this area of the law.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are reported at 571 F.3d 472 (5th Cir. 2009) and 459 F.3d 509 (5th Cir. 2006). App.1a, 63a.

JURISDICTION

After the district court denied Brown's motion to dismiss the indictment, Brown pursued a timely interlocutory appeal to claim protection against double jeopardy. The Fifth Circuit did not examine the indictments but nevertheless found "no impediment to a second trial" on the same, lightly redacted

indictment on June 16, 2009. Rehearing was denied on July 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and *Abney v. United States*, 431 U.S. 651 (1977).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix to the Petition for Writ of *Certiorari* reproduces the text of the Fifth Amendment, and 18 U.S.C. §§ 1341, 1343 and 1346. App.126a-28a.

STATEMENT OF THE CASE

This case arises from the Enron Task Force's novel and unprecedented prosecution of four Merrill Lynch executives based on Enron's accounting in a transaction so financially immaterial that the government did not charge a securities fraud. Instead, the government asserted that the Merrill employees violated the wire fraud provisions of 18 U.S.C. § 1343 and § 1346 while representing Merrill in a business transaction with Enron in late 1999. The government contended the deal was merely a sham to inflate Enron's earnings. *Brown I*, 459 F.3d at 515-16.

Enron solicited Merrill to invest $7 million, and borrow $21 million, to purchase a minority interest in a company owning several power generators built on

barges for emergency use in Nigeria. Tr. 799, 814-15. Corporate and outside counsel of both parties negotiated the transaction, and Enron's counsel, Vinson & Elkins, finalized the sale documents. The documents transferred Enron's risk in the transaction to Merrill, and counsel and employees for both companies intended that Merrill assume the necessary risk to make the transaction a sale. The final documents also contained the customary integration clause, expressly excluding any prior conversations or representations. App.158a-59a. The transaction bore all the hallmarks of a normal business venture. Enron kept Merrill's $7 million and ultimately profited $53 million on the barge sale to a third party. Sentencing Tr. 19, 26-27. Merrill earned a total of $775,000. Brown and his co-Defendants did not make a dime. Merrill Lynch was never indicted. The government did not allege any bribery, kickbacks or self-dealing by any Defendant – nor could it.

After a six-week trial in Houston, in the wake of Enron's collapse and the conviction of Arthur Andersen, a jury convicted Brown and his Merrill co-Defendants on all counts. A divided panel of the Fifth Circuit reversed the conspiracy and wire fraud convictions, finding the Defendants' conduct did not constitute an "honest services" crime. On remand, the government did not return to a grand jury for a new indictment. Instead, it recycled the same indictment, merely redacting the words "honest services" and

most of the indictment's references to 18 U.S.C. § 1346. App.128a.

Brown now faces a second trial on the identical charges, scheme and conduct that the Fifth Circuit held was not criminal under the government's broadest case – an intangible rights or honest services wire fraud. *Brown I*, 459 F.3d at 517, 522-23.

Proceedings in the District Court and the First Appeal

1. Brown and his former Merrill Lynch co-Defendants, Daniel Bayly, Robert Furst, and William Fuhs, were indicted along with two mid-level Enron employees in September 2003 in the Southern District of Texas. App.40a. Count I charged a two-pronged conspiracy to (a) commit wire fraud and (b) falsify Enron's book and records.[4] Counts II and III alleged substantive counts of wire fraud only, correlating directly with the conspiracy to commit wire fraud charged in Count I(a).

2. From the outset, Brown contended that the wire fraud statute, with or without the added breadth of § 1346, did not criminalize his conduct where there was no criminal intent, no pursuit of personal gain, and the transaction was guided and negotiated by

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[4] Count I(b), the "books and records conspiracy," is not implicated in this petition, which addresses only the wire fraud allegations that are ripe for review.

counsel for both parties. Brown also argued that the statutes provided no fair warning that his conduct was criminal. Dkts. 118, 119, 120, 134, 160, 162, 163, 180, 212, 256, 301, 307, 492, 637, 639, 641; *see also* Dkts. 708, 714, 748 (motions for release pending appeal); Dkts. 952, 964, 967, 994, 998, 1004, 1012, 1067, 1076 (motions to dismiss filed after reversal and remand to district court).

3. In the government's view, the barge deal was a "sham," a loan rather than a sale, designed solely to inflate Enron's 1999 earnings. The government's case rested on a few preliminary or draft documents (before review by counsel) and on its hearsay version of a five-minute telephone conversation between Enron CFO Andrew Fastow, other Enron executives, and Merrill executives (but not Brown), in which Fastow allegedly "guaranteed" that Merrill would be bought out in six months.[5] However, under the government's best case, the $40 billion Enron Corporation reported a $12 million pre-tax gain several months early, and should have waited until fall 2000 to report it with the $53 million gain realized upon the sale of the entire barge project. According to the government, the individual Merrill bankers bore criminal responsibility for Enron's incorrect reporting even though the bankers had no legal duty to Enron or its shareholders, did not

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[5] Neither Fastow nor any party to the crucial telephone call testified at trial.

commit securities fraud, engaged in no bribery, kickbacks or self-dealing, and neither sought nor obtained any personal gain.[6] Ignoring the integration clause in the final contract (App.158a), the government viewed the documents, drafted and reviewed by counsel for both companies, as simply part of the fraud in their omission of any reference to the government's version of an alleged "side deal" reached in the Fastow call.

4. Defendants always maintained that Fastow's only assurance to Merrill was that Enron would use its "best efforts" to remarket the barges to a third-party quickly – a representation that, even the government agrees, renders the transaction lawful. *See* Tr. 4520, 6485; App.161a-66a; Government's Opposition to Furst's Corrected Motion For Release Pending Appeal, at 3 n.1, 17; *United States v. Brown*, No. 05-20319 (5th Cir. June 1, 2005); Brief for Appellee United States, at 229-30 n.87, *United States v. Brown*, No. 05-20319 (5th Cir. Oct. 11, 2005).

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[6] Remarkably, if this were a civil case, Brown would have been entitled to dismissal on summary judgment. A different panel of the Fifth Circuit held in a private civil action that Brown and his Co-Defendants owed no duty to Enron or its shareholders and that there was no third-party civil liability for this very transaction. *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 377, 384, 386-87 (5th Cir. 2007), *cert. denied*, *Regents of University of California v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, ___ U.S. ___, 128 S. Ct. 1120 (2008); *see Stoneridge Inv. Partners LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008). Brown was never charged by the SEC.

5. During this seven-year prosecution, the Task Force not only stretched the wire fraud statutes beyond any prior interpretation, but also persuaded the district court to expand the definition of "conspiracy" beyond the universal requisite, "agreement," to include mere "understanding" and to give a *Pinkerton* instruction. Tr. 6113-15, 6124; App.167a-72a. In addition, the prosecutors failed to produce crucial *Brady* material, including evidence that (i) Fastow represented only that Enron would use its "best efforts" to remarket the barges – just as Defendants explained; and, (ii) Merrill's requests to include the "best-efforts" agreement in the final documents were rejected by counsel for Enron, who were adamant that Enron retain no conceivable risk. Dkts. 948, 974, 993, 1004, 1006, 1029, 1039, 1041, 1063, 1067; App.161a.

6. The Task Force prosecutors opposed bail pending appeal – both in the district court and again in the Fifth Circuit – contending that "there was no substantial issue for appeal." All Merrill Defendants were incarcerated. Dkts. 628, 800, 825, 834. Brown served a year in prison awaiting the Fifth Circuit's first decision.

7. On appeal, the Fifth Circuit rejected the government's unprecedented, expansive use of wire fraud. The panel unanimously acquitted William Fuhs. As to Brown, Bayly and Furst, the panel split – much as the Circuits have done. The majority reversed and vacated the conspiracy and wire fraud convictions because Defendants' "alleged conduct is

not a federal crime *under the honest services theory of fraud specifically*."[7] *Brown I*, 459 F.3d at 523 (emphasis in original).

The majority aligned with the Second Circuit, which construed § 1346 to require bribery, kickbacks or self-dealing.[8] *Brown I*, 459 F.3d at 521. The majority also approved Brown's fair warning argument, observing that there was no reason "the Defendants should have recognized, . . . , that the [Enron] 'employee services' taken to achieve [Enron's] corporate goals constituted a *criminal* breach of duty to Enron." *Id.* at 522 (emphasis in original). The majority recognized that "applying the wire fraud statute here . . . would expand honest services fraud to reach all manner of accounting fraud and securities fraud, which have not generally been prosecuted as honest services fraud and are heavily regulated under other statutes." *Id.* at 522 n.13. With

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[7] The majority affirmed convictions of Brown for perjury and obstruction on the basis of an email Brown wrote 14 months after the barge transaction in an unrelated matter. Those convictions are subject to ongoing litigation and a motion to dismiss for egregious prosecutorial misconduct and withholding *Brady* material. Dkts. 948, 974, 993, 1004, 1006, 1029, 1039, 1041, 1063, 1067. While incarcerated pending appeal, Brown served what would have been the maximum possible sentence for those offenses. Dkt. 950.

[8] *United States v. Rybicki*, 354 F.3d 124, 139-44 (2d Cir. 2003) (*en banc*), *cert. denied*, 543 U.S. 809 (2004) (limiting § 1346 to reach (1) bribery and kickbacks, and, (2) conflicted self-dealing). The dissent in *Rybicki* would have declared the statute unconstitutionally vague. *Id.* at 159 (Jacobs, J., dissenting).

concern, it noted: "The government would in fact go even further, . . . the honest services charge would reach Defendants' conduct *even absent an oral buy-back agreement*." This extension "crystalizes the danger we face of defining an ever-expanding and ever-evolving federal common law crime." *Id.* (emphasis in original). The majority expressly refused to address any of Defendants' challenges to the entire, unprecedented indictment or errors in the trial.[9] *Id.* at 517, 523.

Judge Reavley, who wrote the panel decision giving rise to this petition, dissented in *Brown I* and urged that the wire fraud convictions be affirmed. Judge Reavley advocated expanding wire fraud to criminalize "dishonest" conduct without bribery, kickbacks or self-dealing. *Id.* at 532. (Reavley, J., concurring in part and dissenting in part).

Judge DeMoss, writing separately, aligned with the Second Circuit dissenters in *Rybicki*, 354 F.3d at 155-65. He would have reached "defendants' constitutional challenge" to the statutes, reversed all counts, and acquitted Brown of perjury and obstruction.

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[9] It stated that the evidence was "sufficient" to convict Brown, Bayly and Furst. That observation, however, can be nothing more than *dicta* in view of the court's ultimate holding that Defendants' conduct was not criminal under the government's most expansive use of the wire fraud statute, the panel's refusal to review the entire indictment, and the absence of a valid indictment once the court rejected the underpinning of honest services. *Brown I*, 459 F.3d at 525.

Brown I, 459 F.3d at 534-36 (DeMoss, J., concurring in part and dissenting in part). He highlighted "ambiguities in the text," expressed "grave reservations about the statute's application," and noted that the Circuit courts, in their refusal to address "the larger constitutional problem with the statute," have only "clouded the meaning of § 1346" while defining "what constitutes criminal conduct on an *ex post facto* and *ad hoc* basis." *Id.* at 534. Judge DeMoss perceived the government's creative combination of statutes and its theories of criminal conduct as "a very real threat, of potentially dramatic proportion, to legitimate and lawful business relationships and the negotiations necessary to the creation of such relationships." *Id.* at 535. Judge DeMoss also urged: "Such negotiations should not be the fodder for criminal indictments. If there is any criminal wrong arising from the facts in this record, and I have serious doubts on that score, it would be in Enron's employees' reporting of the transaction described in the Engagement Letter, not in the manner in which Merrill's employees negotiated the deal." *Id.* at 536.

Proceedings in the District Court on Remand upon Reversal of the Wire Fraud Convictions

1. Upon remand, without returning to a grand jury, the government simply redacted most of the indictment's references to § 1346 and to the phrase, "including to deprive them [Enron and its shareholders] of the intangible right of honest services of its employees." Dkt. 937. Unlike every case relied

upon by the government in *Brown II*, the government added no new factual allegations or counts. App.129a, 138a.

2. Brown moved to dismiss the indictment alleging that: (i) the indictment as redacted was insufficient on its face to state a wire fraud offense because it does not allege that Brown schemed to take any identified money or property from any victim; (ii) as a matter of law, the indictment always alleged only one wire fraud scheme for which he was acquitted; and, (iii) Brown could not be prosecuted again on the same fraud allegations, scheme and conduct. Dkts. 952, 994, 1012, 1025.

3. The district court denied Brown's motion to dismiss the indictment,[10] but considered the double jeopardy question close enough to warrant an interlocutory appeal. Although it viewed the remaining fraud allegations as a "stand-alone offense," the

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[10] In violation of this Court's decisions in *Stirone v. United States*, 361 U.S. 212, 215-18 (1960), *Russell v. United States*, 369 U.S. 749, 764-66 (1962) and *Cleveland*, 531 U.S. at 24, the district court saved the indictment from dismissal for facial insufficiency by constructively amending it to allege that Brown schemed to deprive Enron of "material economic information." Upon pressure by the district court to identify a specific money or property allegation, the prosecutor could not find one. He referred to ¶ 31 of the indictment, which merely quotes from a memo discussing a "proposed" $250,000 fee to Merrill; and, as to property, pointed to Enron's "false books and records." He conceded: "I am not sure that [material economic information] is specifically alleged in the indictment." Dkt. 1010, at pp. 37-42; App.173a-79a.

district court recognized that the remaining wire fraud charges still depend on the "same facts" and the "same scheme," and that the Fifth Circuit in *Brown I* had not considered the double jeopardy issue. *United States v. Bayly*, No. 04:03-cr-00363 (S.D. Tex. January 7, 2008), App.15a-39a. The district court also commented on the confusion in the law, noting that the Fifth Circuit's opinion reversing Brown's conviction "does not discuss the inter-relationship of the underlying theories of wire fraud all based on the same alleged scheme and set of facts." App.33a. It candidly noted:

> Even the Circuit Court's conclusion that the "Government must turn to other statutes, *or even the wire fraud statutes absent the component of honest services*, to punish this character of wrongdoing," seems to be written more in the abstract rather than as a specific approval for retrying *these* Defendants on *this* Third Superceding Indictment as now redacted.

Id. (emphasis in original) (internal citation omitted). The district court could find no authority analyzing the

> government's ability to prosecute a wire fraud on a money and property theory . . . where the underlying conduct of the employees has been held not to constitute a scheme to defraud the victim of the employee's honest services, let alone a case examining the interplay between these

> theories in the context of a factually similar indictment.[11]

App.34a. Finding that Defendants' double jeopardy claims were not frivolous, the court stayed all proceedings for the *Abney* appeal.

Proceedings on Interlocutory Appeal

1. Brown pursued his double jeopardy argument on interlocutory appeal as to the wire fraud charges in Counts I(a), II, and III.

2. The government claimed a right to prosecute Brown "solely on the ground that [he] deprived Enron and its shareholders and to obtain money and property by means or [sic] materially false pretenses, representations and promises." App.133a. It miscast Brown's appellate argument as an attack on the facial sufficiency of the indictment and argued that the Court of Appeals lacked jurisdiction. The government did not address Brown's double jeopardy argument on its merits. It did, however, effectively concede that jeopardy terminated on "honest services" fraud in *Brown I*, agreeing that the government could proceed only on an indictment that did not depend on honest services.[12] Brief of Appellee United States, at 34, 36,

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[11] The second indictment was factually identical – not just similar. App.40a, 138a.

[12] The reversal in *Brown I* was tantamount to a factual acquittal – the government's best case was insufficient as a matter of law. The Defendants' conduct was not criminal. *See*

(Continued on following page)

United States v. Brown, No. 08-20038 (5th Cir. June 11, 2008).

3. Judge Reavley, the dissenter in *Brown I*, authored *Brown II*, holding that "there is no issue of double jeopardy or collateral estoppel that impairs a retrial here." *Brown II*, 571 F.3d at 499. Adopting the government's view, the court mischaracterized Brown's argument as merely a challenge to the sufficiency of the indictment. *Id.* at 498; App.1a. It affirmed the district court's decision to proceed with a second trial on the "redacted version of the indictment [ ] otherwise identical to the indictment on which the Defendants were convicted at the first trial," and emphasized that it expressed no opinion on the sufficiency of the indictment. *Id.* at 496. It ignored Brown's arguments that as a matter of law: (i) only the breadth added by § 1346 could possibly

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Burks v. United States, 437 U.S. 1, 16 (1978) ("The government's case was so lacking that it should not have even been *submitted* to the jury.") (emphasis in original); *cf. Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986) (judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause). *See also Piatkowski v. Brett*, 256 F.3d 687, 695 (7th Cir. 2001) (decision which is "functional equivalent" of an acquittal will bar retrial under Double Jeopardy Clause). In this case, acquittal on substantive counts bars a second prosecution for conspiracy to accomplish the same offense. *McNally v. United States*, 483 U.S. 350, 361 (1987); *see also United States v. Hughey*, 147 F.3d 423, 436 (5th Cir. 1998) ("If an indictment does not charge a cognizable federal offense, then a federal court lacks jurisdiction to try a defendant for violation of the offense.").

render this conduct criminal; (ii) the indictment always charged only one wire fraud; and, (iii) Brown could not be tried again for the identical fraud. Ignoring the substantive counts based solely on wire fraud, the panel rejected Brown's pure double jeopardy argument as "contrary to a plain reading of *Brown I* which specifically recognized that the indictment alleged three means for the conspiracy." *Id.* at 498. Contradicting itself, the panel conceded that *Brown I* "did not consider any other means of fraud alleged."[13] *Id.* at 497. Rehearing *en banc* was denied. App.124a.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve two interrelated splits in the Circuits: one, concerning the scope of wire fraud and the other, the process by which a claim of double jeopardy is adjudicated. The first split requires this Court's guidance in applying the wire fraud statute to a private business transaction in which the accused neither sought nor obtained money or property. Underlying the Fifth Circuit's refusal to examine the identical scheme,

[13] In another contradiction, in note 26, the panel claims that *Brown I* decided the "limited question whether the indictment alleged one specific type of wire fraud" (*id.* at 498 n.26), but said at the text accompanying note 11 that *Brown I* "expressly declined to address the viability of the money or property charge." *Id.* at 496.

conduct and charges for a double jeopardy violation is a dangerous and fundamental misconstruction of the wire fraud statute, which creates two separate offenses, expanding the statute's reach and potential for abuse. Only after the scope of the wire fraud statute is resolved can this Court meaningfully address the second split and determine when double jeopardy applies.

The Fifth Circuit deviated dangerously from the settled process of determining a double jeopardy claim. It failed to compare the two indictments and did not hold the government to its burden of demonstrating that the recycled indictment alleged a wire fraud offense separate from that for which jeopardy terminated. The Fifth Circuit's failure to examine the indictments cannot be reconciled with the law of this Court and splits from the procedure adopted by eight Circuits to protect this Fifth Amendment right. That error alone merits this Court's review and correction.

This Court has long held that issues of double jeopardy are immediately appealable because a Defendant's right against double jeopardy cannot be vindicated once he has been subjected to the second action. *Abney v. United States*, 431 U.S. 651, 659 (1977). *See United States v. Dixon*, 509 U.S. 688, 692-93 (1993). This important problem of constitutional criminal procedure is confounded, however, because the lower courts cannot discern whether an indictment states one offense, two, or no criminal offense at all. The Fifth Circuit's refusal to examine the

indictment to assess Brown's double jeopardy appeal emanates from the underlying weakness, novelty and breadth of these wire fraud allegations. Thus, this case adds another issue of constitutional dimension to those this Court will address in *Black*, *Weyhrauch*, and *Skilling*, and it offers a vehicle for extending *Cleveland*, to establish that §§ 1343 and 1346 are not separate offenses.

This case is also of great importance because it has been closely watched, has been and will be enormously influential,[14] and has wrought profound unfairness. Petitioner's Appendix, at 142a-58a, *Skilling v. United States*, No. 08-1394 (2009) (documenting prejudicial and voluminous publicity in Houston regarding the collapse of Enron, including for Brown's trial). The Fifth Circuit's decision undermines the Fifth Amendment and grants the government an enormous advantage in complex cases. It also gives the government unwarranted, added incentive to draft complicated and multi-pronged indictments to facilitate repeated attempts to convict or to

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[14] *Brown I* also impacted other cases. *United States v. Howard*, 517 F.3d 731 (5th Cir. 2008); *United States v. Howard*, 471 F.Supp.2d 772 (S.D. Tex. 2007); *see also United States v. Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009); *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 77 U.S.L.W. 3645 (U.S. October 13, 2009) (No. 08-1394); *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 1308 (2009). This Court's decision on this petition will also affect the prosecutions of Bayly and Furst, now scheduled for trial on the same charges in February 2010.

extract a plea of guilty from beleaguered Defendants crushed under the financial, reputational and psychological stress. As this Court and others reverse the government's overreaching wire fraud indictments, the double jeopardy issue has become increasingly important.[15] Therefore, this Court's clarification of the elements and scope of an ever-expanding wire fraud offense must also address the constitutional protection of double jeopardy.

Brown's case is not about being tough on crime, or "protecting the integrity of our public markets," as the prosecutors repeatedly urged. Tr. 390, 6141-42; App.186a. Nor are these the facts on which it might be justified to send a message to Wall Street. Tr. 6557; App.180a-84a. Rather, Brown's original indictment and conviction were secured by over-zealous, creative and ambitious prosecutors at the expense of fundamental constitutional principles. Throughout this prosecution, the Enron Task Force targeted and criminalized lawful business conduct because the Defendants' firm dealt with Enron. *See Morrison v. Olson*, 487 U.S. 654, 727-32 (1988) (Scalia, J.,

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[15] A related issue has already arisen in *Yeager v. United States*, 521 F.3d 367 (5th Cir. 2008), reversed by this Court the day after the Fifth Circuit cited it authoritatively in *Brown II*. *Yeager v. United States*, ___ U.S. ___, 129 S. Ct. 2360 (2009) (the collateral estoppel arm of double jeopardy). Retrial and double jeopardy issues also arose after this Court reversed *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005), and *Hirko v. United States*, ___ U.S. ___, 129 S. Ct. 2858 (2009), and may arise if *Black*, *Skilling* and *Weyhrauch* are reversed.

dissenting) ("It is in this realm – in which the [special] prosecutor selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies."). Now, despite a finding that Brown's conduct was not criminal under the government's broad view of intangible rights, the government seeks to prosecute Brown again – on the same indictment. This is precisely what the Double Jeopardy Clause is meant to prevent. The Fifth Circuit's refusal to examine these novel wire fraud charges for double jeopardy handed the government an undeserved and unlawful "instrument of oppression" to wield against select and unpopular Defendants. *United States v. Martin Linen Supply Co.* 430 U.S. 564, 569 (1977). *Certiorari* is warranted.

I. The Fifth Circuit's Decision Defies The Statutory Text And Cannot Be Reconciled With The Decisions Of This Court Or Of The Fourth, Seventh, Eighth, And Tenth Circuits, Which View §§ 1343 And 1346 As A Single Offense

The Fifth Circuit's decision allowing a second prosecution of Brown depends on a statutory misconstruction that deems § 1346 an offense separate from § 1343 and sets a dangerous precedent.

1. In *United States v. Dixon*, 509 U.S. 688, 696-97 (1993), this Court held that the same conduct could be prosecuted as two offenses only if each statute requires proof of an element that the other

does not. The Fifth Circuit's decision ignores the statutory text, departs from this Court's precedents and those of four Circuits, and fails the *Dixon* test. Wire fraud – with or without the intangible right of honest services – is only one offense, even when described in two statutes. By its text, § 1346 merely defines a phrase of § 1343, and together, they create a single offense: wire fraud. *See Cleveland v. United States*, 531 U.S. 12, 25-26 (2000) (finding one offense in § 1341's two alternate phrases). Section 1346 merely expands the "definition" of "scheme or artifice to defraud" found in § 1343 to include "the intangible right of honest services"; it depends entirely on § 1343 for its essential elements to create an offense at all. Therefore, the text of the two statutes does not create the two separate offenses required for successive prosecution of the same conduct under *Dixon*. *See Brown v. Illinois*, 432 U.S. 161, 168-69 (1977); *Blockburger v. United States*, 284 U.S. 299, 303-04 (1933).

2. This Court has not spoken to whether §§ 1343 and 1346 create one offense or two. However, this Court's decision in *Cleveland* portends the result. In *Cleveland*, looking only at § 1341, this Court rejected the government's argument that the phrases – "any scheme and artifice to defraud," or "for obtaining money or property . . . " – created two separate offenses. The Court held instead that the second phrase modifies the first, creating a single offense. *Cleveland*, 531 U.S. at 25-26. Applying *Cleveland* to the underlying issue in this case, whether the wire fraud

and the "intangible right of honest services" statutes create one offense or two, compels the conclusion that the statutes create only one offense: wire fraud. *See id.*[16] By its text, § 1346 simply modifies the first phrase of § 1343: "any scheme and artifice to defraud." Petitioner asks the Court to extend *Cleveland* and clarify that § 1346 and § 1343 do not create separate offenses for which Brown could be forced to defend a second time.

3. The Fifth Circuit's decision departs from those of the Fourth, Seventh, Eighth, and Tenth Circuits, which view wire and mail fraud as single offenses notwithstanding § 1346. The Fourth Circuit has held that "the elements of a mail fraud scheme involving the deprivation of honest services are identical to those of a normal mail fraud prosecution." *United States v. Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001). The Tenth Circuit also found the elements to be the same. *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003) ("Whether alleging a deprivation of property or honest services or both, a mail or wire fraud indictment must allege a scheme to defraud, an intent to defraud, and use of mail or wire.").

The Seventh Circuit squarely held that "Section 1346 is a definitional clause, not a separate crime, . . ." *United States v. Orsburn*, 525 F.3d 543, 546 (7th

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[16] Legal authority and interpretation of the mail fraud statute are equally applicable to the wire fraud statute. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

Cir. 2008). *Cf. United States v. Turner*, 551 F.3d 657, 667 (7th Cir. 2008). The Eighth Circuit has recognized that § 1346 merely "enlarged the definition of 'scheme or artifice to defraud' under § 1341 [and § 1343]." *United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000). It held that "[t]h[e] [honest services] statute does not stand alone – it modifies the definition of 'scheme or artifice to defraud' in § 1341." *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996). Relatedly, the Eighth Circuit recently held that an indictment sufficiently states a wire fraud without using the words "honest services" or citing § 1346 – as long as the conduct alleged falls within that Circuit's understanding of the offense. *United States v. Redzic*, 569 F.3d 841, 846 (8th Cir. 2009).

In these Circuits, a second trial of Brown on these wire fraud charges would violate double jeopardy because the government's allegations of "honest services" and citation to § 1346 were superfluous – the government's redactions changed nothing. Thus, the offense is the identical wire fraud, with the same elements, and there is no separate wire fraud for which Brown can be tried a second time for the same (non-criminal) conduct.

4. As a matter of law, the "intangible right of honest services" was the government's only colorable argument for criminalizing the conduct of a loyal Merrill employee who did not scheme to take money or property. In *Cleveland*, 531 U.S. at 12, 19-20, this Court held that "honest services," as codified in § 1346, is the only "intangible right" to which Congress

restored protection after *McNally*. Similarly, the Sixth and First Circuits, and even a different panel of the Fifth, have recognized that "§ 1346, by its terms, did not restore the application of the mail fraud statute to all 'intangible rights,'" but only to the deprivation of honest services. *United States v. Turner*, 465 F.3d 667, 673 (6th Cir. 2006); *see United States v. Czubinski*, 106 F.3d 1069, 1076 (1st Cir. 1997); *United States v. Gray*, 96 F.3d 769, 773-74 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129 (1997). A review of the indictment establishes that the government's wire fraud charges against Brown depended entirely on "intangible rights" because of both the limited nature of the factual allegations, and the bare-bones, generic statutory language recited in the indictment.

5. Brown was indicted originally and faces a second trial on factual allegations that, "as part of a scheme to manipulate Enron's reported earnings, Enron and Merrill Lynch executives engaged in a year-end 1999 deal that involved the 'parking' of Enron assets with Merrill Lynch." App.40a, 43a, 138a, 141a. Asserting that a "secret side-deal," made in the phone call with Fastow, created a loan rather than a sale, the indictment further alleges that by "facilitating the Enron executives' deception, Merrill Lynch executives solidified Merrill's status as a 'friend of Enron'" and that Enron executives received unwarranted bonuses. App.40a, 43a, 137a, 140a. As for the legal violations, Count I indicted Brown for conspiring:

> along with conspirators Andrew S. Fastow and Ben F. Glisan, Jr., and others [ ] to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, **[including to deprive them of the intangible right of honest services of its employees]**,[17] and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to transmit and cause to be transmitted by means of wire communication . . . , all in violation of Title 18, United States Code, Sections 1343, 1346 [sic][18]; and (b) knowingly and willfully falsify books, records and accounts of Enron in violation of Title 15, United States Code, Sections 78m(b) (2) (A) & (B), 78m(b) (5) and 78ff and Title 17, Code of Federal Regulations, Section 240.13b2-1.

Counts II and III allege two substantive wire fraud offenses based on the same conduct and purported scheme of Count I(a):

> defendants . . . , having devised a scheme and artifice to defraud Enron and its shareholders, **[including to deprive them of the intangible right of honest services**

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[17] The bolded and bracketed language was redacted by the government after the Fifth Circuit's decision in *Brown I*. App.129a, 138a.

[18] The government did not redact this citation to § 1346. App.149a.

> **of its employees]**, and to obtain money and property . . . (of Title 18, United States Code, Sections 1343, **[1346]**, 2 and 3551 *et seq.*)

Without the § 1346 intangible right of honest services (bolded and bracketed above), the wire fraud allegations amount to no indictment at all. *See* App.138a. In *Cleveland*, this Court rejected the government's malleable concept of property rights and held that a traditional wire fraud must be predicated on a scheme to defraud specific victims of money or property that was in their hands before the fraud. "It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the [wire] fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15.

Undeterred by the reasoning and approach of *Cleveland*, this second prosecution depends on an (unalleged and legally non-existent) intangible right to "material economic information" that the district court read into the indictment. This unalleged right appeared in a *Brown I* jury instruction demanded by the government. App.172a. Thus, even the government's purported "second prong of wire fraud" (its supposed "straightforward scheme to deprive of money and property") depended – then and now – entirely upon what the district court instructed the jury was an "intangible right[ ]" that "certain persons

have to some kinds of information."[19] App.40a, 129a, 138a, 172a.

6. Despite this Court's decision in *Cleveland*, confusion still reigns regarding the elements and scope of wire fraud. As the Seventh Circuit noted in *United States v. Black*, 530 F.3d 596, 601 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009), "honest services fraud bleeds into money or property fraud."[20] Courts and scholars have expressed growing concern regarding the "anathema" of federal common law. *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia,

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[19] In *Brown I*, the district court instructed the jury – over Brown's strong objections – that the indictment alleges two schemes to defraud – one, of honest services; the second, of property. App.167a. Dkt. 439, pp.22-29. Tellingly, however, the Court's definition of "property" circled back to a purported "intangible right." On the government's motion, the court defined property to include:

> Certain intangible rights, such as the right that certain persons have to some kinds of information. Thus shareholders of a corporation have a property right to the full and accurate reporting of the corporation's material economic information so that shareholders can monitor and police the behavior of the corporation and its officers and directors in order to protect the value of the shareholders' investment.

App.172a.

[20] *See also* Paul Mogin, *The Property Rights Limitation in Mail and Wire Fraud Cases*, CHAMPION at 24 (April 2008) (discussing confusion regarding what constitutes "property"); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 733 (1999) ("the 'scheme or artifice to defraud' element of generic fraud statutes, such as mail fraud, has expanded and contracted throughout the years").

J., dissenting).[21] In the absence of clear lines, prosecutors have indicted on increasingly creative and unprecedented concepts of criminality. *See, e.g.*, *United States v. Turner*, 465 F.3d 667, 676-78, 683 (6th Cir. 2006) (vacating mail fraud convictions and dismissing indictment in election fraud case premised on the novel theory that the candidate attempted to obtain money – a salary); *United States v. Ratcliff*, 488 F.3d 639, 645-46 (5th Cir. 2007) (reversing a conviction and dismissing an election scheme indicted as mail fraud where there were "no allegations that the [victim] would be deceived, either directly or indirectly, into taking any action at all").

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[21] *See* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 179 (1994) (noting how judicial interpretation of intangible rights is "an excellent example of judicial crime creation. Prosecutors and judges, by repeatedly using the facts of a specific case to fill the interstices left by the vague mail fraud statute, effectively exercise lawmaking powers. The process . . . allows the executive and judicial branches to usurp legislative functions. Judicial crime creation invites and encourages prosecutors to bring previously undefined conduct to trial in the hope that the court will criminalize it."); John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 3 (1983) (arguing that mail fraud statute "seems destined to provide the federal prosecutor with what Archimedes long sought – a simple fulcrum from which one can move the world"). The breadth and depth of the Circuit splits in regard to § 1346 alone is profound. *See* Brief for Amicus Curiae NACDL, *United States v. Black*, No. 08-876 (August 2009).

7. The expansive interpretations of §§ 1343 and 1346 stand in stark contrast to the "basic principle that a criminal statute must give fair warning" of the conduct that makes it a crime. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964); *cf. United States v. Bass*, 404 U.S. 336, 348 (1971). The lack of fair warning extends not only to the nature of the crime, but also to its parameters. Only the current chaos in the law and the government's unbounded creativity and seemingly unlimited resources for retrials make it possible for one offense to be construed as two, and, for something as sacred as the protection against double jeopardy to be lost. The Fifth Circuit's finding that Brown's conduct was not criminal under the government's broadest scheme and artifice to defraud, including the "intangible right of honest services," should have terminated all wire fraud charges against Brown. *Dixon*, 509 U.S. at 696; *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977). However, until this Court cabins the aggressive expansion of these statutes and clarifies the applicability, if any, of "intangible rights" to private commercial transactions, protection of the Double Jeopardy Clause is itself jeopardized.

II. The Fifth Circuit's Refusal To Compare The Indictments On Brown's Double Jeopardy Claim Cannot Be Reconciled With This Court's Precedent And Conflicts With The Procedure Adopted In Eight Circuits

A. To Be Meaningful, the Prohibition Against Double Jeopardy Must Be Protected Before a Second Trial Begins

For centuries, a Defendant has been entitled to plead an acquittal as a bar "upon a prosecution for the same identical act and crime." 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 330 (1769). This fundamental right was enshrined in our Fifth Amendment: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., Amend. V.

"[T]here has never been any doubt of [the Fifth Amendment's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence." *Ex Parte Lange*, 85 U.S. 163, 168-69, 173 (1873). The "principle [is] that no man shall more than once be placed in peril of legal penalties upon the same accusation." *Id.* at 173. The central premise of the Double Jeopardy Clause "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling

him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

This right is so important that it is one of the few this Court protects by permitting an interlocutory appeal. "[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Abney v. United States*, 431 U.S. 651, 662 (1977). Even if a Defendant "has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.*

Brown is entitled to that review and protection here. Neither the alleged conduct, the purported scheme, nor the offense has changed from that which the Fifth Circuit found was not a federal crime. Having failed to prove that Brown's conduct constituted a crime under its most liberal construction of the vaguest of statutes, the government is not entitled to a second chance. *See Burks v. United States*, 437 U.S. 1, 16 (1978) (The prosecution, having "one fair opportunity to offer whatever proof it could assemble," failed to make its case.).

B. The Fifth Circuit's Refusal to Review the Indictments Cannot Be Reconciled with a Century of this Court's Precedent, and Defies the Settled Practice of Eight Circuits

1. The government is bound by "the precise manner" in which its indictment is drawn, because the indictment clarifies the extent to which the Defendant "may plead a former acquittal or conviction." *Sanabria v. United States*, 437 U.S. 54, 65-66 (1978) (internal citations omitted). The charging decision and description of the offense in the charging instruments must be imputed to the government for double jeopardy purposes. *See Downum v. United States*, 372 U.S. 734, 737-38 (1963) (double jeopardy barred retrial where first jury's failure to arrive at a verdict was solely attributable to prosecution); *Saylor v. Cornelius*, 845 F.2d 1401, 1403-07 (6th Cir. 1988) (double jeopardy bars retrial where "ending of the trial without a conviction of the defendant was . . . due to the action of the prosecution"); *see also United States v. Dinitz*, 424 U.S. 600, 611 (1976) (double jeopardy "bars retrials where bad-faith conduct by judge or prosecutor, threatens the harassment of an accused by successive prosecutions . . . so as to afford the prosecution a more favorable opportunity to convict the defendant") (internal citations omitted); *United States v. Tateo*, 377 U.S. 463, 468 n.3 (1964) (double jeopardy inquiry considers prosecutorial overreaching in the necessity for second prosecution).

Instead of examining the indictments, the statutes or the jurisprudence, *Brown II* looked only to the prior panel decision in *Brown I*. *Brown II* concluded, based on *dicta* and inferences from the *Brown I* opinion, that "the indictment alleged three means for the conspiracy." *Brown II*, 571 F.3d at 498. *Brown II* viewed the indictment as alleging more than one wire fraud, saw no double jeopardy issue, and therefore, held that it had no appellate jurisdiction. *Id.* at 498 n.26, 499. The *Brown II* panel, however, never performed the essential task of comparing the two indictments. The Fifth Circuit's approach and conclusion cannot be reconciled with this Court's decisions and splits from the settled procedure of eight Circuits, and previously its own.

2. For more than a century, this Court has focused on the charges against a Defendant to evaluate a claim of double jeopardy. *See Grafton v. United States*, 206 U.S. 333, 350 (1907) (jeopardy bars second prosecution of soldier in a civil court after acquittal of the same offense by military tribunal). The text of the Double Jeopardy Clause itself hinges on whether the offense for which a Defendant is to be tried or punished is the same. *United States v. Dixon*, 509 U.S. 688, 696-97 (1993). In *Dixon*, this Court reaffirmed the "*Blockburger*" test, which "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars . . . successive prosecution." *Dixon*, 509 U.S. at 696. *See Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977) (double jeopardy bars second

prosecution for an offense after jeopardy attached on a statutory offense incorporated in it). As Justice Scalia noted in *Grady v. Corbin*, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting), the second prosecution in *Harris* "was impermissible because it would again force the Defendant to defend against the charge of robbery." The same is true here. The government would force Brown to defend against wire fraud again – the same offense and the same conduct. Because the Double Jeopardy Clause "presupposes that sameness can be determined before the second trial," this Court must address the wire fraud issue so that "sameness can be determined" before Brown is put in jeopardy a second time. *Grady*, 495 U.S. at 529.

3. Successive prosecution of Brown also violates the rule of *Brown v. Ohio*, 432 U.S. 161 (1977), in which this Court held that "[w]here the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings." *Id.* at 166. It is beyond dispute that Brown cannot receive consecutive sentences on each of the government's "theories" of wire fraud – all based on identical conduct. *See Dixon*, 509 U.S. at 704 (Double Jeopardy Clause "serves the function of preventing both successive punishment and successive prosecution . . . but there is *no* authority, . . . , for the proposition that it has different meanings in the two contexts") (emphasis in original). A separate "theory" of criminality does not constitute a separate

offense. *Braverman v. United States*, 317 U.S. 49, 54 (1942) (distinguishing single offense based on same underlying conduct, for which only a single punishment may be imposed, from "successive acts which violate a single penal statute and from a single act which violates two statutes"). Because Brown could not be punished cumulatively for "honest services fraud" and "money or property fraud" regarding the same conduct, the government cannot prosecute him in successive proceedings.

4. To protect the sacred right against double jeopardy, eight Circuits have held that "when a defendant puts double jeopardy in issue with a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses."[22] *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988) (discussing origins and collecting cases); *see also United States v. Laguna-Estela*, 394 F.3d 54, 56 (1st Cir. 2005) ("A defendant claiming double jeopardy has the burden of presenting evidence to establish a *prima facie* non-frivolous double jeopardy claim. Once such a claim is established, the

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[22] The Fifth Circuit applied this standard until Brown's case. *See United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001); *United States v. Stricklin*, 591 F.2d 1112, 1117-18 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979). The panel only cited *Delgado* in a footnote and did not attempt to discuss or distinguish it in *Brown II*.

burden shifts to the government to prove by a preponderance of the evidence that the indictments charge separate offenses.") (internal citation omitted); *United States v. Olmeda*, 461 F.3d 271, 282-83 (2d Cir. 2006) (same); *United States v. Liotard*, 817 F.2d 1074, 1077 (3d Cir. 1987) (same); *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1981) (same); *United States v. Doyle*, 121 F.3d 1078, 1089 (7th Cir. 1997) (same); *United States v. Hively*, 437 F.3d 752, 762 (8th Cir. 2006) (same); *United States v. Lloyd*, 743 F.2d 1555, 1562-63 (11th Cir. 1984) (same).

Brown established a *prima facie* case of double jeopardy. The government did not obtain a new indictment, and "whiting-out" the words "honest services" did not create a separate wire fraud offense arising out of the identical facts. The government cannot meet its burden of establishing that its current indictment charges a wire fraud offense at all – much less a separate one. Brown faces a second trial on identical wire fraud charges, however, because the Fifth Circuit ignored settled procedure. Had the Fifth Circuit compared the two indictments and held the government to its burden, the indictment would have failed the *Dixon* test.

5. The underlying substantive law is so clouded that a Defendant's constitutional right against double jeopardy has been lost in the fog. The Circuit discord over the interrelationship and elements of "wire fraud," and the absence of any discernable outer boundary of this crime, especially when intangible rights are implicated, has placed Brown in jeopardy

again. Brown engaged in no conduct that was itself unlawful, yet he stands on the precipice of a second trial for the same wire fraud that the Fifth Circuit found was not criminal. By allowing honest services (§ 1346) and wire fraud (§ 1343) to be prosecuted as separate offenses, the Fifth Circuit sacrificed Brown's fundamental constitutional right.

6. Brown's double jeopardy challenge flows ineluctably from the original, and now recycled, unprecedented charges and from the government's relentless prosecution – apparently as many times as it takes until this Court intercedes. Both Brown's original conviction and this second threat of jeopardy exemplify the abuse of this expansive statute "by headline-grabbing prosecutors in pursuit of . . . [those] who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of *certiorari*). That the double jeopardy issue arises in the context of the government's increasingly novel theories of wire fraud starkly demonstrates the need for this Court to resolve these recurring issues of central importance to our criminal laws, our Constitution, and the fair administration of justice. By granting *certiorari* in this case, this Court can: (i) extend *Cleveland* and clarify that § 1346 and § 1343 create only one offense; (ii) confirm and make uniform the procedure adopted by the majority of Circuits that compare the indictments and shift the burden to the government to establish that there is a separate offense; and,

(iii) protect Brown from the irreparable harm of a second trial for the same offense and conduct already adjudged insufficient to constitute a crime and for which he had no fair warning.

CONCLUSION

Where the Double Jeopardy Clause applies, "its sweep is absolute." *Burks*, 437 U.S. at 11 n.6. This petition for *certiorari* should be granted.

October 23, 2009

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20038

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAMES A BROWN; ROBERT S FURST;
DANIEL BAYLY

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jun. 16, 2009)

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

REAVLEY, Circuit Judge:

The defendants in this interlocutory appeal, all former employees of Merrill Lynch, appear before us for the second time in connection with charges that they conspired to defraud the Enron Corporation and its shareholders by agreeing with Enron employees to "park" assets with Merrill Lynch in order to artificially enhance Enron's 1999 earnings. The assets at

issue were power-generating barges located off the coast of Nigeria that Merrill Lynch allegedly agreed to buy from Enron based on a secret side-deal that Enron would buy the barges back in six months. After a jury convicted the defendants in a general verdict for *inter alia* conspiracy and substantive wire fraud offenses, we reversed those convictions on the legal ground that the circumstances of the transaction were not covered by the honest services theory of wire fraud, which was one of three means of fraud charged in the indictment. *See United States v. Brown* (*Brown I*).[1] The Government then sought to re-try the defendants without the honest services theory. The defendants now appeal from the district court's denial of their motion to dismiss the indictment on grounds of double jeopardy. We AFFIRM the district court's judgment.

I.

The underlying facts of the alleged fraudulent transaction between Enron and Merrill Lynch are recounted in great detail in *Brown I*. Briefly stated, Enron's Asia/Pacific/Africa/China (APACHI) energy division was under pressure in 1999 to sell assets in order to meet earnings targets but had been unsuccessful in finding a buyer for the Nigerian barges, and so it turned to Merrill for help. As this court wrote:

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[1] 459 F.3d 509, 517 (5th Cir. 2006).

> Merrill agreed to invest $7 million to purchase equity in the barges so that Enron could record $12 million in earnings and meet its forecasts. The Government contended, however, that the sale was a sham because Enron executives orally promised Merrill a flat fee of $250,000 and a guaranteed 15% annual rate of return over the six-month period of Merrill's investment; Enron executives allegedly promised that Enron or an affiliate would buyback Merrill's interest in the barges if no third party could be found. Such a buyback agreement, the Government contended, rendered Merrill's interest in the barges risk-free, meaning that Enron's accounting of the deal as a sale rather than a lease was false.[2]

Enron approached Merrill in December 1999 and recorded the barge deal at the end of that year after multiple discussions among the defendants and Enron employees. Merrill was apparently willing to participate because of the opportunity to foster good relations with Enron and because Enron management, including C.F.O. Andrew Fastow, purportedly gave verbal assurances that Merrill would be taken out of the deal within six months for a fixed rate of return on the investment. Enron allegedly paid Merrill an "advisory fee" of $250,000 even though Merrill did not provide any advisory services. In late June 2000, Merrill sold the barges through arrangements from

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[2] *Id.* at 513.

Enron to a third company controlled by Fastow for just over $7.5 million, representing the promised six-month rate of return. Merrill thus earned $775,000 as a result of its assistance to Enron, which was able to inflate and misstate its earnings report.[3]

The Government charged the defendants, along with several others, in a Third Superseding Indictment with violating the wire fraud statutes under 18 U.S.C. §§ 1343[4] and 1346[5] by scheming to defraud both Enron and its shareholders. Count one charged a conspiracy while counts two and three alleged substantive offenses.[6] In *Brown I* we identified three

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[3] *See id.* at 514-16.

[4] The statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

[5] "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

[6] Count one alleged in relevant part that the defendants:

> conspired to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain

(Continued on following page)

objects alleged for the conspiracy: (1) to commit wire fraud by fraudulent deprivation of Enron's money or property (the "money or property charge"); (2) to commit wire fraud by fraudulent deprivation of the intangible right to honest services (the "honest services charge"); and (3) to falsify Enron's books and records (the "books and records charge").[7]

The jury found the defendants guilty in a general verdict, but we reversed. We noted that because the jury was not asked to indicate the basis for its verdict, we could affirm only if the Government proved

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money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds . . . and (b) knowingly and willfully falsify books, records and accounts of Enron. . . .

Counts two and three alleged that the defendants,

having devised a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to defraud, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, specifically [as stated in two separate counts, certain interstate transmissions by facsimile and email between Houston and New York].

[7] *Brown I*, 459 F.3d at 516, 518.

all three theories alleged for criminal liability.[8] The panel majority concluded, however, that the circumstances of the transaction as alleged by the Government did not extend to honest services wire fraud. The panel reasoned that while honest services fraud generally involves bribery, kickbacks, or self-dealing, the defendants' conduct was disassociated from such actions. The panel noted that the Enron employees here breached a fiduciary duty in pursuit of corporate earnings goals, which Enron had tied through incentives to employee compensation.[9] The panel noted in a footnote that Enron's corporate incentive policy, coupled with "senior executive support" for the barge transaction, created an understanding that Enron was a "willing beneficiary [ ] of the scheme" and set the case apart from other honest services fraud cases.[10] We specifically limited our holding to be that the conduct alleged by the Government was not a federal crime under the honest services theory of fraud, and we expressly declined to address the viability of the money or property charge and the

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[8] *Id.* at 518 (citing *Yates v. United States,* 354 U.S. 298, 77 S. Ct. 1064 (1957)).

[9] *See id.* at 522 (stating that "where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud").

[10] *Id.* at 522-23 n.13 (distinguishing *United States v. Gray,* 96 F.3d 769 (5th Cir. 1996)).

books and records charge remaining in the indictment.[11]

Upon remand, the Government moved to redact the indictment to remove all references to the honest services theory of fraud. The redacted version of the indictment is otherwise identical to the indictment on which the defendants were convicted at the first trial. The defendants moved to dismiss the redacted indictment, raising claims of double jeopardy and arguing in part that *Brown I* necessarily precluded a retrial. The district court denied the motion but certified the double jeopardy claims for interlocutory appeal.[12]

II.

Defendants Bayly and Furst contest on double jeopardy grounds the money or property charge of the redacted indictment. They contend that they may not be retried insofar as the indictment alleges that they schemed to deprive Enron of money or property. They reason that the Government must prove for this charge that they intended to deceive the putative victim but that this court held in *Brown I* that Enron was a willing participant in the scheme. They further contend that although Enron and its shareholders are legally distinct, the district court erroneously

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[11] *Id.* at 523.

[12] *See generally Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034 (1977).

determined that a fraud could be worked on the corporation given that senior executives, including Fastow, approved the deal and the executives' actions show the corporation was not a victim. Finally, they argue that even if the shareholders could be victims, the redacted indictment fails to allege the deprivation of a legally cognizable money or property interest. They do not contend that retrial on the books and records charge would violate double jeopardy.

In a separate brief, Defendant Brown argues that a retrial is barred by the Double Jeopardy Clause because the original indictment charged as the object of the wire fraud only the deprivation of the intangible right of honest services, a theory that *Brown I* rejected. According to Brown, the redacted indictment fails to allege a valid offense apart from the honest services charge because it fails to allege an identifiable and cognizable object of money or property as the basis for the fraud and fails to allege that any Merrill Lynch employee deprived or took anything away from Enron or its shareholders.

"As traditionally understood, the Double Jeopardy Clause precludes multiple prosecutions and multiple punishments for the same offense." *United States v. Yeager.*[13] When a reviewing court determines that the evidence at the first trial was insufficient and reverses a conviction, a retrial will be barred by

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[13] 521 F.3d 367, 371 (5th Cir. 2008).

double jeopardy. *See Burks v. United States.*[14] A reversal on any other ground will not foreclose a second trial. *United States v. Scott.*[15] The Double Jeopardy Clause also incorporates the collateral estoppel doctrine, which means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson.*[16]

The defendants' arguments in this appeal largely implicate this latter aspect of double jeopardy and require us to revisit *Brown I.*[17] Whether a prosecution violates the Double Jeopardy Clause or is precluded by collateral estoppel are issues of law that we review *de novo.*[18]

We are not persuaded that our decision in *Brown I* precludes a retrial. Our opinion there was guided by the general verdict rule, which "requires a verdict to

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[14] 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51 (1978).

[15] 437 U.S. 82, 90-91, 98 S. Ct. 2187, 2193-94 (1978) ("The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge." (internal citation omitted)).

[16] 397 U.S. 436, 443, 90 S. Ct. 1189, 1194 (1970).

[17] Indeed, Bayly and Furst contend in their reply brief that our statement in *Brown I* that Enron was a willing participant in the barge scheme is dispositive of their appeal.

[18] *Yeager*, 521 F.3d at 370-71; *United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001).

be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States.*[19] Citing *Yates,* we determined that the defendants' convictions could not be upheld because there was no way to tell on which theory the jury had rested its verdict and the Government failed to prove that the honest services charge extended to the defendants' conduct.[20] But we did not consider any other means of fraud alleged. We could not have been clearer that our reversal was premised narrowly and solely on the failure of the honest services charge, stating: "This opinion should not be read to suggest that no dishonest, fraudulent, wrongful, or criminal act has occurred. We hold only that the alleged conduct is not a federal crime *under the honest-services theory of fraud specifically.*"[21] The opinion implicitly, if not explicitly, recognized the possibility that criminal wrongdoing might be proved in a retrial, as we noted that "the Government must turn to other statutes, or even the wire fraud statutes absent the component of honest services, to punish this character of wrongdoing."[22] *Brown I* thus did not on its face preclude a retrial on the money or property charge because the

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[19] 354 U.S. 298, 312, 77 S. Ct. 1064 (1957), *overruled on other grounds by Burks v. United States,* 437 U.S. 1, 98 S. Ct. 2141 (1978).

[20] *Brown I,* 459 F.3d at 518, 523.

[21] *Id.* at 523 (emphasis in original).

[22] *Id.* at 522-23.

panel did not rule that the evidence for that charge was insufficient.[23]

Nor are we persuaded by Bayly and Furst that the panel's footnote reference to Enron as a "willing beneficiary" precludes a theory of Enron as a victim for all purposes. First, this contention does not account for the Enron shareholders, who were also alleged in the indictment to be victims apart from the corporation. Second, as part of the honest services discussion in *Brown I*, the "willing beneficiary" language was used to narrow the construction of honest services fraud to exclude the defendant's conduct and to distinguish the case.[24] The decision did not consider other avenues alleged for conviction, and instead noted that we "need not address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges)."[25] Enron was thus not excluded by the

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[23] *See Scott*, 437 U.S. at 90-91, 98 S. Ct. at 2193-94.

[24] *See Brown I*, 459 F.3d at 522-23 & n.13; *see also United States v. Skilling*, 554 F.3d 529, 545 (5th Cir. 2009) ("In essence, *Brown [I]* created an exception for honest-services fraud where an employer not only aligns its interests with the interests of its employees but also sanctions the fraudulent conduct, i.e., where the corporate decisionmakers, who supervised the employees being prosecuted, specifically authorized the activity."), *pet. for cert. filed*, 77 U.S.L.W. 3645 (U.S. May 11, 2009) (No. 08-1394).

[25] *Brown I*, 459 F.3d at 523.

decision in *Brown I* as a victim for purposes of those charges.[26]

Brown's contention that the original indictment alleged only an honest services wire fraud offense, and that therefore a retrial presents a pure double jeopardy issue, is contrary to a plain reading of *Brown I,* which specifically recognized that the indictment alleged three means for the conspiracy. Brown's real argument is that without reference to honest services, the remaining allegations of the indictment are insufficient to state an offense. For example, he argues that the redacted indictment uses boilerplate language alleging a scheme to obtain money or property but fails to identify a specific object of that scheme. That contention is not a double jeopardy claim, however, and is not properly before us on interlocutory review.[27]

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[26] We hold only that *Brown I* does not preclude a retrial for the money or property charge and books and records charge. We do not hold that Enron or its shareholders were deceived, but whether they were or not for purposes of the additional fraud allegations is a question of fact best resolved at trial, not by a reviewing court addressing, as we did in *Brown I,* the limited question whether the indictment alleged one specific type of wire fraud offense. As an appellate court, we do not find facts. *See, e.g., Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714, 106 S. Ct. 1527, 1530 (1986).

[27] *See Abney,* 431 U.S. at 663, 97 S. Ct. at 2042 (holding that the sufficiency of the indictment does not come within the rule permitting interlocutory review of a denial of a motion to dismiss); *see also United States v. Arreola-Ramos,* 60 F.3d 188, 191 (5th Cir. 1995) ("The interlocutory appeal that *Abney* permits is,

(Continued on following page)

The defendants present additional challenges in the guise of double jeopardy but which similarly implicate sufficiency issues based on the district court's ruling. The district court held that the participation of Enron executives in the barge deal did not preclude Enron and its shareholders from being victims of the fraud because the corporation and shareholders enjoy a separate identity from corporate officers and directors. It further determined that the right to accurate shareholder information is a legally cognizable intangible property right under the wire fraud statutes. Bayly and Furst contend that Enron's shareholders could not be victims separate from the corporation because the indictment fails to allege the shareholders were deprived of either money or legally cognizable "property." They also contend that shareholders possess no cognizable property right under 18 U.S.C. § 1343 in accurate economic information. Brown similarly argues that the indictment fails to allege a scheme to defraud any victim of that victim's specific money or property, and that honest services are the only intangible right protected under the wire fraud statutes. If the defendants are correct – and we intimate no opinion on the matter – their arguments concern the sufficiency of the offense alleged in the indictment, an issue which we do not address and which must be left for another day.[28]

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however, limited to double jeopardy claims and does not include other challenges.").

[28] *Abney*, 431 U.S. at 663, 97 S. Ct. at 2042.

III.

We conclude that there is no issue of double jeopardy or collateral estoppel that impairs a retrial here. The district court's judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
v.	§	C.R. NO. H-03-363
DANIEL BAYLY, JAMES BROWN, and ROBERT FURST	§	

ORDER ON MOTIONS TO DISMISS

(Filed Jan. 7, 2008)

Pending are Defendants' Motions to Dismiss (Documents Nos. 952 and 964).[1] After having carefully considered the motions, responses, replies, and the applicable case law, and after having heard counsels' oral arguments on the same, the Court concludes for the reasons that follow that the motions should be denied.

Background

Defendants Brown, Bayly, and Furst (collectively "Defendants") move to dismiss the Third Superseding Indictment from which the honest services theory has been struck. *See United States v. Brown,* 459 F.3d 509

[1] Defendant Robert Furst moved to join these motions, which the Court granted by Order dated September 25, 2007. Document No. 977.

(5th Cir. 2006). Defendants challenge the substantive wire fraud charges in Counts Two and Three, and the conspiracy to commit wire fraud charge in Count One, alleging that (1) the Indictment fails to allege facts that Defendants sought to "obtain" anything from the putative victims; (2) the allegations do not articulate the deprivation of a cognizable property interest on the part of Enron's shareholders; and (3) Enron itself was not a victim of the alleged wire fraud scheme. Defendants also contend that the conspiracy charge cannot be based on 15 U.S.C. § 78m(b), which criminalizes the falsification of corporate books and records, because § 78m(b) applies only to "issuers" of securities.

Discussion

"An indictment is sufficient if it contains the elements of the offense charged, informs the defendant of the charges, and enables the defendant to plead acquittal or conviction and avoid future prosecutions for the same offense." *United States v. Hatch,* 926 F.2d 387, 391-92 (5th Cir. 1991); *see also United States v. Debrow,* 74 S. Ct. 113, 115 (1957) (holding that an indictment must "clearly inform[ ] the defendants of that with which they [are] accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense"). "In reviewing a challenge to an indictment alleging that it fails to state an offense, the court is required to take the allegations of the indictment as true and to determine whether an offense

has been stated." *United States v. Crow*, 164 F.3d 229, 234 (5th Cir. 1999); *see also United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004).

A. Substantive Wire Fraud and Conspiracy to Commit Wire Fraud

1. "Obtain" Versus "Deprive" in 18 U.S.C. § 1343

Defendants contend that the charges of wire fraud and conspiracy to commit wire fraud must be dismissed because the Indictment fails to allege any facts that Defendants sought to "obtain" for themselves any money or property from the putative victims. *See* Document No. 964 at 7-11; Document No. 952 at 14-15. According to Defendants, "the only schemes 'to defraud' that are actionable under the wire fraud statute are those that are aimed at actual or attempted property *acquisition*." Document No. 964 at 9. On this proposition, the circuits are split. *Compare Monterey Plaza Hotel Ltd. v. Local 483*, 215 F.3d 923, 926-27 (9th Cir. 2000) (requiring that a defendant seek to *obtain* money or property), *United States v. Walters*, 997 F.2d 1219, 1224-27 (7th Cir. 1993) (same), *and United States v. Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988) (same), *with Porcelli v. United States*, 404 F.3d 157, 162 (2d Cir. 2005) (concluding that "the defendant does not need to literally 'obtain' money or property to violate the statute"); *United States v. Hedaithy*, 392 F.3d 580, 601-02 (3d Cir. 2004) (same); *and United States v. Welch*, 327 F.3d 1081, 1106-07 (10th Cir. 2003) (same). The Fifth

Circuit appears not to have directly discussed this issue.

The starting point for interpreting statutes "must be the language of the statutes themselves." *United States v. Anderez,* 661 F.2d 404, 406 (5th Cir. 1981). Title 18, Section 1343, of the United States Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343. The offenses of wire fraud and its counterpart, the mail fraud statute, § 1341,[2] contain two basic elements: "(1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail [or wires] for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts)." *Carter v. United States,* 120 S. Ct. 2159, 2165 (2000) (quoting *Schmuck v. United States,* 109 S. Ct. 1443, 1453

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[2] "The Supreme Court has said that because the mail and wire fraud statutes share the same language in relevant part, the same analysis applies to each." *United States v. Mills,* 199 F.3d 184, 188 (5th Cir. 1999) (citing *Carpenter v. United States,* 108 S. Ct. 316, 320 n.6 (1987)).

(1989)). As the Fifth Circuit has held, the first element may be satisfied by proving either: (1) "the defendant devised a scheme or artifice to defraud . . . , or (2) the defendant devised a scheme or artifice to engage in one of the . . . fraudulent acts specified" in the statute. *United States v. Caldwell,* 302 F.3d 399, 406 (5th Cir. 2002). Under both § 1341 and § 1343, the "fraudulent acts specified" include "[to] obtain[ ] money or property by means of false or fraudulent pretenses, representations, or promises. . . ." *See id.*; 18 U.S.C. §§ 1341, 1343; *see also United States v. Chandler,* 376 F.3d 1303, 1311 (11th Cir. 2004) ("The phrasing of the statute in the disjunctive prohibits two separate unlawful acts, each constituting an independent ground for prosecution."); *United States v. Cronic,* 900 F.2d 1511, 1513 (10th Cir. 1990) ("Although largely overlapping, a scheme to defraud, and a scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, are separate offenses."); *United States v. Clausen,* 792 F.2d 102, 104-05 (8th Cir. 1986) ("Courts have construed this statute to forbid *both* schemes to defraud, whether or not any specific misrepresentations are involved, *and* schemes to obtain money or property by means of false or fraudulent pretenses, representations, or promises.").

The statute's dichotomy is persuasively analyzed in *United States v. Hedaithy*:

> We explained the interaction between the first and second clauses of § 1341 in *United States v. Thomas,* 315 F.3d 190 (3d Cir.

> 2002), in which we stated that "Congress intended the second dependent clause of the mail fraud statute to broaden the scope of the first clause. The mail fraud statute was thus intended to cover 'any scheme or artifice to defraud [one of his money or property],' *including* any '[scheme] for obtaining money or property by means of false or fraudulent . . . promises.'" *Id.* at 198 (quoting *McNally*, 483 U.S. at 351, 107 S.Ct. 2875) (second alteration in original). Under Defendants' interpretation of § 1341, however, the statute would cover "any scheme or artifice to defraud [one of his money or property]," *but limited to* any "[scheme] for obtaining money or property." Such an interpretation contravenes our holding in *Thomas* and we must therefore reject it.

392 F.3d at 602 (footnote omitted). Defendants in this case are arguing for the same limitation on schemes to defraud and, for the reasons explained in *Hedaithy* and similar cases, the argument must be rejected.

As also seen in *Hedaithy* above, Defendants' reliance on *McNally v. United States*, 107 S. Ct. 2875 (1987), for the proposition that the "obtain" language in the second clause wholly limits the scope of the "schemes to defraud" punishable under § 1343 is misplaced. *See* Document No. 964 at 7-11. *McNally* held that Congress, by adding the second clause, "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," intended to clarify that a "scheme to defraud" also

includes "'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" *McNally,* 107 S. Ct. at 2880-81 (quoting *Durland v. United States,* 16 S. Ct. 508, 511 (1896)). In doing so, Congress did not depart from the historical understanding of "fraud" as embedded in the first clause, which requires "wronging one in his *property rights* by dishonest methods or schemes." *Id.* at 2881 (emphasis added). Thus, the two clauses are read conjunctively only insofar as *McNally* interpreted both to require the deprivation of money or property as the object of the fraud. However, as discussed above, it is well-recognized that the first and second clauses, in terms of the *manner* of executing the fraud, prescribe separate offenses. *See, e.g., Caldwell,* 302 F.3d at 406. *McNally* itself observed that the words "to defraud," as used in the first clause, "usually signify the *deprivation* of something of value by trick, deceit, chicane or overreaching." *McNally,* 107 S. Ct. at 2881 (quoting *Hammerschmidt v. United States,* 44 S. Ct. 511, 512 (1924)) (emphasis added). One therefore may by dishonest means seek to defraud another of money or property without intending to obtain or to appropriate that interest for himself.

2. Legal Sufficiency of the Alleged Shareholder Property

Defendants contend that the shareholders' intangible property right implicated in the Indictment – access to accurate corporate information – is not a

cognizable property right sufficient to support the wire fraud charges. *See* Document No. 964 at 12-17; Document No. 952 at 15-18. Defendants argue that the only intangible rights recognized under § 1343 are those involving honest services. However, the mere intangibility of a property right "does not make it any less 'property' protected by the mail and wire fraud statutes." *Carpenter v. United States,* 108 S. Ct. 316, 320-21 (1987) (holding that a scheme to misappropriate confidential business information fell within the scope of § 1341); *see also Cleveland,* 121 S. Ct. at 371 (citing *Carpenter* with approval); *United States v. Little,* 889 F.2d 1367, 1368-69 (5th Cir. 1989) (recognizing valuable economic information as an intangible property right).

Although the Fifth Circuit has not adjudged whether a shareholder's right to accurate corporate information constitutes a cognizable intangible property interest in the context of §§ 1341 or 1343, the Second Circuit provides persuasive precedent in *United States v. Wallach,* 935 F.2d 445, 450-54, 460-64 (2d Cir. 1991), which had a factual scenario similar to the instant case. In *Wallach,* the defendants, third-party consultants, were convicted of mail fraud, in concert with corporate officials, for hiding from shareholders the true nature of compensation packages the company offered to the consultants in order to avoid negative tax implications, skirt the Securities and Exchange Commission ("SEC"), and artificially inflate revenue and profit numbers. *Id.* at 450-54, 460-61.

Drawing from decisions in which courts have recognized the deprivation or inaccurate reporting of material economic information as a deprivation of "property" under the mail and wire fraud statutes – including the Fifth Circuit's opinion in *Little* – the court explained that a shareholder's ownership interest in the corporation carries with it certain ancillary property rights necessary to preserve and protect that interest:

> A stockholder's right to monitor and to police the behavior of the corporation and its officers is a property interest. This incident of stock ownership represents one way that a shareholder can protect the value of his or her investment. The maintenance of accurate books and records is of central importance to the preservation of this property interest. "The stockholders' right of inspection of the corporation's books and records rests upon the underlying ownership by them of the corporation's assets and property" and is an incident of "ownership of the corporate property." Indeed, given the important role that information plays in the valuation of a corporation, the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest.

Id. at 462-63. The court concluded that the mail fraud statute encompassed the defendants' use of the mails to "misrepresent the nature of the transactions in which they were involved[,]" thereby "obscur[ing]"

the value of the corporate stock and depriving the corporation and its shareholders "of the opportunity to make informed decisions." *Id.* at 463-64.

The wire fraud alleged in this Indictment is premised on Enron's ostensible sale of the Nigerian barges to Merrill Lynch when, in fact, Defendants and Merrill Lynch allegedly agreed to the transaction only because the "purchase" was not real. The Indictment charges that there was an "oral 'handshake' side-deal that Merrill Lynch would receive a rate of return of approximately 22% and that Enron would sell the barges to a third party or repurchase the barges within six months"; hence, Merrill Lynch's supposed equity investment was not truly "at risk" and Enron's executives should not have treated the transaction as a sale from which earnings and cashflow could be recorded in 1999. The fact that the transaction was reported to Enron's shareholders and the public as a *bona fide* sale for which earnings were reported necessarily deprived the shareholders of their right to complete and accurate information, and allegedly made Enron appear more profitable to the public than it was in fact. *Id.* at 4-5. Through the foregoing scheme, Defendants deprived Enron's shareholders of access to accurate corporate information and undermined their ability "to police the behavior of the corporation and its officers," thereby impairing their ability effectively to protect their ownership interest in Enron. *See Wallach,* 935 F.2d at 463. *Wallach,* which itself relies on analogous Fifth Circuit precedent, supports the conclusion that accurate

shareholder information is a legally cognizable intangible "property" right within the meaning of the wire fraud statute.[3]

3. Enron As a Victim

a. Implications of the *Brown* decision

Defendants also assert that the Fifth Circuit's opinion in *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), forecloses the treatment of Enron as a victim of the alleged scheme to defraud. *See* Document No. 964 at 3-7; Document No. 952 at 16-18. In *Brown*, the Fifth Circuit held that Defendants could not have conspired to or schemed to defraud Enron of honest services under § 1346. *See Brown*, 459 F.3d at 518-23. Its decision rested on the fact that the dishonest conduct of Enron officials was "disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest." *Id.* at 522. Because the Fifth Circuit held the honest services theory of wire fraud legally

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[3] Defendants also suggest that recognizing a property right in accurate shareholder information would impermissibly overlap with federal securities laws. *See* Document No. 964 at 15-17; Document No. 952 at 18. However, "[t]he Federal Criminal Code is replete with provisions that criminalize overlapping conduct. The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino v. United States*, 125 S. Ct. 1766, 1773 n.4 (2005) (internal citations omitted).

insufficient, it went no further in its analysis of the wire fraud charges. *Id.* at 522-23.

In fact, the Fifth Circuit "specifically" limited its analysis in *Brown* to the honest services theory of wire fraud, without reaching money or property wire fraud. *Id.* The court expressly stated that its "opinion should not be read to suggest that no dishonest, fraudulent, wrongful, or criminal act has occurred. We hold only that the alleged conduct is not a federal crime *under the honest-services theory of fraud specifically*." *Id.* at 523 (emphasis in original). *Brown* stated that "the Government must turn to other statutes, *or even the wire fraud statutes absent the component of honest services,* to punish this character of wrongdoing." *Id.* 522-23 (emphasis added).[4]

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[4] Defendants also highlight *Brown*'s characterization of Enron as a "willing beneficiary" to suggest that Enron cannot be a victim. *See* Document No. 964 at 4 (citing *Brown*, 459 F.3d at 522-23 n.13). However, like the entire *Brown* discussion regarding wire fraud, this term and its application apply only to the honest services theory of wire fraud and not to a money or property theory. *See Brown*, 459 F.3d 523. Moreover, a corporation and its shareholders enjoy identities separate and distinct from corporate officers or directors. *See Wallach*, 935 F.2d at 462, 464 (recognizing the separate roles played by shareholders, directors, officers, and the corporation itself). Hence, the alleged involvement of Enron insiders in the alleged scheme does not preclude Enron from being a victim. *Id.* at 464. As the court in *Wallach* held:

> We cannot accept defendants' argument that the directors and officers of the corporation have the authority to act on behalf of the shareholders and the corporation and that therefore a criminal fraud

(Continued on following page)

The Third Superseding Indictment, with the honest services theory now stricken, charges Defendants only with wire fraud and conspiracy to commit wire fraud under a money or property theory and falsification of books and records theory. *See* Document No. 937 at 9, 12. Although *Brown* exclusively analyzed the Government's honest services theory of wire fraud, and expressly declined to "address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges)," *Brown*, 459 F.3d at 523, the Circuit's simultaneous statement that the "Government must turn to other statutes, or even the wire fraud statutes absent the component of honest services," *id.*, on balance leads to the conclusion that *Brown* does not exclude Enron as a victim of the money or property theory of wire fraud alleged in the Indictment.

> cannot be perpetrated when all the officers are participants in the scheme. Defendants would have us endorse a theory of criminal law that would effectively grant corporate officials and third-parties working in concert with them a license to loot the corporate treasury as long as they were all in on the scheme. . . . Such a theory completely fails to recognize and to protect the property interests of the shareholders and the corporation.

Id.

b. Dismissal on the Basis of Double Jeopardy

Relying on their interpretation of *Brown,* however, Defendants assert that to re-try them on a theory that Enron was a victim would violate the Double Jeopardy Clause. *See* Document No. 964 at 3-6; Document No. 1022 at 1-2. According to Defendants, the money and property theory of fraud remaining in the Indictment depends on proof that Enron employees with whom Defendants allegedly conspired necessarily deprived Enron of the honest services of those Enron employees – the very theory invalidated in *Brown.* Asserting that there is a "logically inextricable connection" between the honest services and money and property theories of wire fraud with respect to the Enron employees, the Merrill Lynch Defendants argue that the Double Jeopardy Clause will be violated if they are retried for conduct committed jointly with those Enron employees – allegedly to victimize Enron by defrauding it of money and property – when the Fifth Circuit has held that Enron was not deprived of the honest services of those same employees on the same set of facts.

The Double Jeopardy Clause of the Fifth Amendment incorporates the doctrine of collateral estoppel. *See Ashe v. Swenson,* 90 S. Ct. 1189, 1195 (1970). "Collateral estoppel guarantees that 'when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future

lawsuit.'" *United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir. 1997) (quoting *Ashe,* 90 S. Ct. at 1194)). The doctrine of collateral estoppel completely bars a subsequent prosecution "when an issue of ultimate fact has once been determined by a valid and final judgment." *Ashe,* 90 S. Ct. at 1194.

The Court's opinion in *Brown* emphasizes in italics that its holding is "only that the alleged conduct is not a federal crime *under the honest-services theory of fraud specifically*." *Brown,* 459 F.3d at 523 (emphasis in original). The Court traced the history of § 1346, which criminalizes the deprivation of another's "intangible right of honest services." The Court declared its agreement with the Second Circuit in *United States v. Rybicki,* 354 F.3d 124 (2d Cir. 2003), and construed the statute to proscribe either bribery and kickbacks or self-dealing, which were not present here. Given the Fifth Circuit's narrow construction of the statute, it does not necessarily follow that Enron's employees still could not have conspired and schemed with the Merrill Lynch Defendants to defraud Enron of money and property that did not entail bribery, kickbacks, or self-dealing by Enron's employees.

Brown concluded that the legal insufficiency of the honest services theory underlying the general verdict on charges of wire fraud and conspiracy required reversal of Defendants' convictions pursuant to *Yates v. United States,* 77 S. Ct. 1064, 1073 (1957) (holding that the legal invalidity of one of multiple theories of criminal liability underlying a general verdict of conspiracy requires reversal of the conviction). *See*

Brown, 459 F.3d at 517, 523. It is well settled that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge." *United States v. Scott*, 98 S. Ct. 2187, 2193-94 (1978). Given *Brown*'s construction of § 1346 and the emphatic limitation of its holding to the honest services theory as so construed, its express citation to *Yates* as mandating reversal, and the Court's determination that the honest services theory was legally, not factually, insufficient, Defendants' double jeopardy argument lacks merit. Defendants may properly be retried on the independent money and property theory of wire fraud, both as a stand-alone offense, and as a predicate offense to the conspiracy charge.[5]

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[5] Defendants also contend that, pursuant to *Brown*, the law-of-the-case doctrine precludes relitigation of Enron's status as a victim of the alleged fraud. *See* Document No. 964 at 6-7. As discussed above, because *Brown* reversed "*under the honest-services theory of fraud specifically*," the court declined to "address the viability of the Government's remaining theories of criminal liability," including the money or property theory of wire fraud. *Brown*, 459 F.3d at 523. Defendants' subsequent prosecution under a theory that *Brown* did not consider or adjudicate will not require the trial court to revisit issues of fact or law definitively resolved on appeal so as to implicate the law-of-the-case doctrine. *See, e.g., United States v. Beccara*, 155 F.3d 740, 752 (5th Cir. 1998) (stating that the law-of-the-case doctrine precludes the district court from revisiting issues of law or fact decided on appeal).

c. Interlocutory Appeal of Double Jeopardy Claim

Alternatively, Defendants request that this Court certify their Double Jeopardy claim as non-frivolous to enable an interlocutory appeal on this issue. "[T]he denial of a double jeopardy motion is an appealable order under 28 U.S.C. § 1291." *United States v. Dunbar,* 611 F.2d 985, 987 (5th Cir. 1980) (en banc) (citing *Abney v. United States,* 97 S. Ct. 2034 (1977)). Whether a trial should be delayed pending interlocutory resolution of a double jeopardy claim depends on the court's express findings that such claim is not frivolous. *See id.* at 987-88. "If the claim is frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of jurisdiction over the case. If nonfrivolous, of course, the trial cannot proceed until a determination is made of the merits of an appeal." *Id.* at 988; *see also United States v. Angleton,* 221 F. Supp. 2d 696, 703 (S.D. Tex. 2002) (Rosenthal, J.) (stating that courts should not stay proceedings if a double jeopardy claim is frivolous or sought merely for purposes of delay).

The Fifth Circuit has instructed that courts should apply the literal meaning of the term "frivolous" when determining whether to stay the case pending interlocutory appeal, bearing in mind that the frivolousness inquiry is intended to prevent dilatory claims, not colorable ones. *See United States v. Kalish,* 690 F.2d 1144, 1154 (5th Cir. 1982); *see also Angleton,* 221 F. Supp. 2d at 736-37. For instance, "whether arguments are frivolous for the purpose of

imposing sanctions, courts examine whether 'they are warranted by existing law or any plausible good faith argument for the extension, modification or reversal of existing law.'" *Angleton,* 221 F. Supp. 2d at 739 (quoting *Reed v. Commercial State Bank of El Campo,* 861 F.2d 1381, 1383 (5th Cir. 1988)); *see also* FED. R. CIV. P. 11(b)(2). The Supreme Court has noted that a double jeopardy plea is considered non-frivolous if it is "colorable," that is, a claim to which "there is some possible validity." *Richardson v. United States,* 104 S. Ct. 3081, 2034 n.6 (1984).

This Court's reading of *Brown,* set forth above, depends in large measure upon the Fifth Circuit's emphatic limitation of its review to, and narrow construction of, § 1346, and its expressed declination to "address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges)." *Brown,* 459 F.3d at 523. Those same factors, however, also support an inference that the Fifth Circuit may not have considered the syllogistic argument now advanced by Defendants, namely, that (1) *Brown* holds that Defendants and Enron employees on the scheme to defraud alleged in this case did not deprive Enron of its intangible right to honest services of its implicated employees; (2) Defendants are now charged with conspiring and acting jointly with the same Enron employees on the same scheme to defraud Enron of its money and property; and (3) to try Defendants on the latter charge necessarily requires proof that Enron was deprived of the intangible right

to the honest services of its implicated employees, which subjects Defendants to double jeopardy.

This Court has concluded that while proof of Defendants and Enron employees jointly conspiring and acting to defraud Enron of money and property would implicate one's common understanding of honest services owed to Enron by its employees, *Brown* expressly limits its holding to this scheme not constituting a crime under § 1346. This is because the appellate court essentially interprets § 1346 as proscribing only bribery, kickbacks, and self-dealing. Whether this is a bright-line limitation on the reach of § 1346, however, appears somewhat doubtful. For example, *Brown* limited "to its facts" and did not attempt "to call into question the result" adjudged in *United States v. Gray,* 96 F.3d 769 (5th Cir. 1996), which affirmed convictions of mail and wire fraud to deprive an employer of its employees' honest services under § 1346 where the crime involved no bribery, kickbacks, or self-dealing. *Brown,* 459 F.3d at 522-23, n.13. Moreover, *Brown* does not discuss the interrelationship of the underlying theories of wire fraud all based on the same alleged scheme and set of facts. Even the Circuit Court's conclusion that the "Government must turn to other statutes, or *even the wire fraud statutes absent the component of honest services,* to punish this character of wrongdoing," *id.* at 523 (emphasis added), seems to be written more in the abstract rather than as a specific approval for retrying *these* Defendants on *this* Third Superseding Indictment as now redacted. Moreover, neither side

has cited any authority, and the Court has found none, analyzing the Government's ability to prosecute wire fraud on a money and property theory when the victim is an employer of persons charged in the scheme and where the underlying conduct of the employees has been held not to constitute a scheme to defraud the victim of the employees' honest services, let alone a case examining the interplay between these theories in the context of a factually similar indictment. The Court therefore must conclude that Defendants' double jeopardy argument at least meets the threshold of not being frivolous, as that term is explained in *Dunbar* and *Kalish,* and Defendants have not advanced their argument solely for the purpose of delay. Accordingly, if Defendants timely perfect an interlocutory appeal of this Order under *Abney* and *Dunbar,* this Court will not be able to proceed in this case until the Court of Appeals determines the merits of Defendants' double jeopardy claim.

B. Conspiracy to Falsify Books and Records

Defendants also challenge the conspiracy to falsify books and records charge. *See* Document No. 964 at 18-24; Document No. 952 at 18-36. Defendants contend that because § 78m(b) governs the conduct of "issuers," there can be no criminal liability when a third party conspires with an issuer to falsify books or records. *See* Document No. 964 at 18-24; Document No. 952 at 18-29. Section 78m(b) states:

(2) Every issuer which has a class of securities registered pursuant to section 781 of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall –

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that –

(i) transactions are executed in accordance with management's general or specific authorization;

. . . .

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

15 U.S.C. § 78m(b)(2), (4)-(5). Assuming, *arguendo*, § 78m(b) creates liability only for "issuers," Defendants' argument is still flawed.

Title 18, Section 371, of the United States Code criminalizes conspiracy to "commit any offense against the United States." 18 U.S.C. § 371. The general conspiracy rule proclaims § 371 to be "'a broad and comprehensive provision denouncing conspiracies to commit offenses created by *any* of the statutes of the United States.'" *U.S. v. Gibson,* 881 F.2d 318, 321 (6th Cir. 1989) (quoting *Thomas v. United States,* 156 F. 897, 901 (8th Cir. 1907)). Accordingly, "the incapacity of a person to commit the substantive offense does not necessarily imply that he may conspire with others to commit the offense with impunity, since the state may criminalize the collective planning of the criminal conduct." *United States v. Castle,* 925 F.2d 831, 833 (5th Cir. 1991) (citing *Gebardi v. United States,* 53 S. Ct. 35, 37 (1932)); *see also Salinas v. United States,* 118 S. Ct. 469, 477 (1997). "For example, it is a crime for a bankrupt to conceal property from his trustee, and thus only bankrupts may be convicted of the substantive offense of concealing property. But convictions of others for conspiring with the bankrupt to conceal property have been upheld." *Castle,* 925 F.2d at 833.

A limited exception to the general conspiracy rule exists when "Congress intend[s] in [statutes] to deter and punish certain activities which necessarily involve[] the agreement of at least two people, but Congress [chooses] in [the] statutes to punish only one party to the agreement." *Id.* at 833, 836 (applying this exception to find that foreign officials who accepted bribes were exempt from prosecution for

conspiracy to violate the Foreign Corrupt Practices Act ("FCPA") because that statute only criminalized the conduct of the payors) (footnote omitted); *see also Gebardi,* 53 S. Ct. at 36-37 (holding that women who agreed to be transported across state lines for illicit purposes could not be prosecuted for conspiracy to violate the Mann Act because the Act only criminalized the conduct of the transporters).

In this case, § 78m(b) criminalizes the knowing falsification of corporate books and records by issuers of securities. *See* 15 U.S.C. § 78m(b). Unlike the Mann Act and the bribery provision in the FCPA, which each require participation by at least two parties but where Congress has criminalized the conduct of only one and not the other, the conduct proscribed by § 78m(b) does not require participation by a second party whose conduct is not criminalized by the statute. *See id.*; *see also United States v. Lake,* 472 F.3d 1247, 1263-67 (10th Cir. 2007) (concluding that the exception articulated in *Gerbardi* and *Castle* would not invalidate a charge of conspiracy to circumvent the internal accounting controls required in § 78m(b) because participation of another person is not necessary to violate the substantive offense). Therefore, the exception to the general conspiracy rule is inapplicable. Just as non-bankrupt persons can conspire with a bankrupt petitioner to hide the bankrupt's assets, so too can non-issuers conspire

with issuers to falsify the issuer's books and records – as it is alleged that Defendants did here.[6]

For the foregoing reasons, Defendants Daniel Bayly's, James Brown's, and Robert Furst's Motions to Dismiss (Document Nos. 952 and 964) are hereby DENIED. However, Defendants' contention that the Double Jeopardy Clause will be violated if they are retried for wire fraud on the money and property

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[6] Defendants also argue that because Enron was "a massive user of capital, closing more than fifty financing deals annually totaling $20 *billion* or more," the relatively small Nigerian Barge transaction was immaterial as a matter of law, and therefore the books and records charge must be dismissed. *See* Document No. 952 at 30-36 (internal quotation marks omitted). Materiality is governed by a "reasonable investor" standard. *Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 208 & n.16 (5th Cir. 1988) (citing *Durning v. First Boston Corp.*, 815 F.2d 1265, 1268 (9th Cir. 1987)) (applying principles of materiality in discussing the standards governing the very similar issue of adequacy of disclosure). "The test for determining whether or not a fact is material is whether 'there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.'" *Durning*, 815 F.2d at 1268 n.4 (quoting *TSC Indus. Inc. v. Northway, Inc.*, 96 S. Ct. 2126, 2132 (1975)). Thus, the size of the Nigerian Barge transaction in proportion to Enron's annual dealings is inconsequential to the analysis of materiality. Moreover, assuming, without deciding, that materiality is required to violate § 78m(b), generally, "materiality is a question for the jury, not the court." *United States v. McGuire*, 99 F.3d 671, 672 (5th Cir. 1996) (citing *United States v. Gaudin*, 115 S. Ct. 2310 (1995)); *see also S.E.C. v. World-Wide Coin Invs., Ltd.*, 567 F. Supp. 724, 748-50 (D.C. Ga. 1983) (holding that the SEC is not required to prove materiality to establish a violation of section 13(b)(2) of the Securities and Exchange Act of 1994, codified at § 78m(b)(2)).

theory is found to be a colorable, non-frivolous contention.

It is SO ORDERED.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED in Houston, Texas, on this 7th day of January, 2008.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	Cr. No. H-03-363
	§	(Werlein, J.)
v.	§	
	§	*Violations*: 18 U.S.C.
DANIEL BAYLY,	§	§§ 371 (Conspiracy);
DAN O. BOYLE,	§	1001(a)(2) (False State-
JAMES A. BROWN,	§	ments); 1343, 1346
WILLIAM R. FUHS,	§	(Wire Fraud); 1503
ROBERT S. FURST, and	§	(Obstruction of Justice);
SHEILA K. KAHANEK,	§	1623 (Perjury)
	§	
Defendants.	§	

THIRD SUPERSEDING INDICTMENT

(Filed Jul. 22, 2004)

The Grand Jury charges:

I. Introduction

A. Enron

1. At all times relevant to this Indictment, Enron Corp. ("Enron") was an Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the purchase and sale of natural gas, construction and ownership of pipelines and power facilities, provision of telecommunication services, and trading in contracts to buy and sell various commodities. Before it filed for bankruptcy on December 2, 2001, Enron was the seventh largest corporation in the United States.

2. Enron was a publicly traded company whose shares were listed on the New York Stock Exchange. As a public company, Enron was required to comply with regulations of the United States Securities and Exchange Commission ("SEC"). Those regulations protect members of the investing public by, among other things, ensuring that a company's financial information is accurately recorded and disclosed to the public.

3. Under SEC regulations, Enron and its officers had a duty to make and keep books, records and accounts that fairly and accurately reflected Enron's business transactions and to file with the SEC reliable quarterly and annual reports.

4. Conspirator Andrew S. Fastow was Enron's Chief Financial Officer ("CFO") from March 1998 to October 24, 2001. As CFO, Fastow had oversight over many of Enron's financial activities. During the time that he served as Enron's CFO, Fastow also served as the general partner and otherwise was in control of certain special purpose entities with which Enron did business, including LJM 2 Co-Investment, L.P. and its affiliates ("LJM2").

5. Conspirator Ben F. Glisan, Jr., was Enron's Treasurer from the spring of 2000 until the fall of 2001. Glisan assisted in supervising Enron's structured finance, cash flow and debt management activities.

6. Defendant DAN O. BOYLE joined Enron in 1998 and held a variety of positions, including Vice

President in Global Finance. BOYLE was a lead employee assigned to effectuate the Nigerian barge transactions discussed below.

7. Defendant SHEILA K. KAHANEK joined Enron in 1998 after working at Ernst & Young LLP as an accountant. KAHANEK held a variety of accounting positions at Enron, including being promoted in January 2000 to Senior Director in the Enron Asia Pacific/Africa/China (commonly referred to as APACHI) division. KAHANEK was another lead employee assigned to effectuate the Nigerian barge transactions discussed below.

8. As Enron employees, Fastow, Glisan, BOYLE, and KAHANEK each owed a duty to Enron and its shareholders to provide the company with their honest services.

B. Merrill Lynch & Co., Inc.

9. Merrill Lynch & Co., Inc. ("Merrill Lynch") was a Delaware corporation with its headquarters in New York, New York. Merrill Lynch was a major financial institution, with offices in Houston and Dallas, Texas, among other places. Merrill Lynch engaged in business with various leading corporations, including Enron.

10. At all times relevant to Count One of this Indictment, defendant DANIEL BAYLY was the head of the Global Investment Banking division at Merrill Lynch; defendant JAMES A. BROWN was the head of

Merrill Lynch's Strategic Asset Lease and Finance (formerly known as Global Structured Finance) group; and defendant WILLIAM R. FUHS was a Vice President reporting to BROWN in BROWN's finance group; and defendant ROBERT S. FURST was the Enron relationship manager for Merrill Lynch in the investment banking division and as such was responsible for generating business for Merrill Lynch from Enron. Defendants BAYLY, BROWN, and FURST were all Managing Directors of Merrill Lynch.

II. The Nigerian Barge Transactions

11. From in or about and between December 1999 through January 2001, as part of a scheme to manipulate Enron's reported earnings, Enron and Merrill Lynch executives engaged in a year-end 1999 deal that involved the "parking" of Enron assets with Merrill Lynch. The parking of the assets with Merrill Lynch enabled Enron executives to enhance fraudulently Enron's year-end 1999 financial position that Enron presented to the public and to pay Enron executives unwarranted bonuses. By facilitating the Enron executives' deception, Merrill Lynch executives solidified Merrill Lynch's status as a "friend of Enron" and thereby positioned Merrill Lynch and themselves to receive an increased slice of the lucrative deals that Enron dispensed to financial institutions. Defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, WILLIAM FUHS, ROBERT S. FURST, and SHEILA K. KAHANEK, along with

conspirators Fastow and Glisan, and others, all knowingly participated in this illegal scheme.

12. In 1999, Enron unsuccessfully sought to sell an interest in electricity-generating power barges moored off the coast of Nigeria. When Enron failed to sell the project by December 1999, Enron executives, including Fastow, defendants BOYLE and KAHANEK, and others arranged for Merrill Lynch to serve as a temporary buyer so that Enron could record earnings and cash flow in 1999 and thus appear more profitable to the public than it in fact was. Merrill Lynch agreed to pay $28 million for the barges, with 75% of that amount fronted by Enron itself. Merrill Lynch's purchase of the Nigerian barges allowed Enron executives to record improperly $12 million in earnings and $28 million in funds flow in the fourth quarter of 1999. Those inflated numbers in turn enabled the business unit from which the barge deal emanated to meet its targeted financial goals for the year, which in turn led to increased unwarranted bonuses to executives in that business unit.

13. Merrill Lynch executives, including defendants DANIEL BAYLY, JAMES A. BROWN, WILLIAM R. FUHS, and ROBERT S. FURST, and others, agreed to purchase the Nigerian barges only because Merrill Lynch executives knew that the "purchase" was not real. Enron executives promised Merrill Lynch that it would receive a return of its investment plus an agreed-upon profit within six months. Specifically, Enron executives promised in an oral "handshake" side-deal that Merrill Lynch would

receive a rate of return of approximately 22% and that Enron would sell the barges to a third party or repurchase the barges within six months. Because of these promises from Enron executives, Merrill Lynch's supposed equity investment was not truly "at risk" and Enron should not have treated the transaction as a sale from which earnings and cash flow could be recorded in 1999.

14. In order to mask the full agreement from regulators, auditors, and others, Enron and Merrill Lynch executives entered into written agreements on December 29, 1999, that gave the outward appearance that Merrill Lynch was truly buying the Nigerian barges and accepting all the risks and rewards of an equity investment. Hidden from outside parties were the oral components of the agreement between the parties, which guaranteed Merrill Lynch a rate of return and set a deadline by which Merrill Lynch would no longer hold the barges for Enron.

15. On June 29, 2000, with no true third-party purchaser having been found to buy Merrill Lynch's interest as the six-month deadline loomed, Enron executives arranged for LJM2, which was operated and controlled by Fastow, to purchase Merrill Lynch's interest. Without any negotiation between Merrill Lynch and LJM2 as to the purchase price, Enron executives caused LJM2 to pay $7,525,000 to Merrill Lynch, which represented a $525,000 premium over Merrill Lynch's original investment to account for the agreed-upon approximate 22% rate of return

promised by Enron. Enron executives also agreed to pay LJM2 a substantial but undisclosed fee for entering into the deal with Merrill Lynch. Enron executives subsequently arranged for a third party to purchase LJM2's interest in the barges, again at a profit to LJM2.

III. The Defendants' Obstruction of The Investigations Into The Nigerian Barge Transactions

16. The Nigerian barge transactions have been the subject of investigation by various entities. To hide their criminal conduct, the defendants DANIEL BAYLY, JAMES A. BROWN, WILLIAM R. FUHS, ROBERT S. FURST, and DAN O. BOYLE and others, obstructed those investigations.

A. The Enron Grand Jury Investigation

17. In March 2002, a special Grand Jury empaneled in the Southern District of Texas (the "Enron Grand Jury") commenced a criminal investigation of all matters relating to Enron's collapse involving potential violations of the federal criminal laws, including an examination of financial institutions' employees who may have conspired with and aided and abetted Enron's employees in criminal offenses. Among other matters, the Enron Grand Jury has examined the Nigerian barge transactions to determine whether Enron and Merrill Lynch entered into an oral side agreement in December 1999. As part of that investigation, the Enron Grand Jury has

heard from dozens of witnesses and reviewed voluminous records from Enron, Merrill Lynch, and LJM2, among others.

18. As part of its investigation concerning the Nigerian barge transactions, on September 25, 2002, the Enron Grand Jury called as a witness defendant JAMES A. BROWN to testify. While under oath, defendant BROWN testified falsely as to a material matter by stating that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction.

19. On October 8, 2003, Special Agents of the FBI on the Enron Task Force interviewed defendant WILLIAM R. FUHS concerning the barge transactions. Defendant FUHS made false statements as to a material matter by stating that he did not knew of any oral side deal and promise between Enron and Merrill Lynch relating to the barge transaction.

B. The SEC Investigation

20. The SEC has conducted a civil investigation into the Nigerian barge transactions as part of its larger investigation into the collapse of Enron. It too sought to determine whether there was an oral side agreement between Enron and Merrill Lynch. As part of its investigation it interviewed and deposed numerous witnesses and reviewed voluminous documents concerning the barge transactions.

21. On July 10, 2002, the SEC called defendant DANIEL BAYLY as a witness to testify under oath in a deposition concerning the barge transactions. Defendant BAYLY testified falsely as to a material matter by stating, among other things, that he did not know of any oral guarantee between Enron and Merrill Lynch relating to the barge transaction.

22. On August 20, 2002, the SEC called defendant WILLIAM R. FUHS as a witness to testify under oath in a deposition concerning the barge transactions. Defendant FUHS testified falsely as to a material matter by stating, among other things, that he did not know of any oral guarantee between Enron and Merrill Lynch relating to the barge transaction.

23. On November 20, 2002, the SEC called defendant JAMES A. BROWN as a witness to testify under oath in a deposition concerning the barge transactions. Defendant BROWN again testified falsely as to a material matter by stating, among other things, that he did not know of any oral agreement between Enron and Merrill Lynch relating to the barge transaction. In fact, Brown was aware of an oral agreement between Merrill Lynch and Enron regarding the barges. On March 2, 2001, Brown sent an email ("the BROWN E-mail") to colleagues concerning his suggestion that Merrill Lynch enter into an oral side agreement in a deal with a company unrelated to Enron (the "Company"). The BROWN E-mail stated in relevant part:

> I'm not convinced yet that we can't obligate [the Company] more than Frank indicated, but I've been on the road the last 3 days and haven't been able to determine that. If its [sic] as grim as it sounds, I would support an unsecured deal provided we had total verbal surrances [sic] from [the Company] ceo or Cfo, and schulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with [defendant Daniel] Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well.

C. The Congressional Investigation

24. In the summer of 2002, the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate ("the Congressional Committee") conducted an investigation and hearing concerning, among other things, the Nigerian barge transactions. As part of that investigation, which was conducted pursuant to the authority of the Congressional Committee consistent with applicable rules of that body, the staff of the Congressional Committee interviewed and deposed witnesses and reviewed hundreds of documents concerning the transactions.

25. On July 17, 2002, the staff of the Congressional Committee interviewed defendant ROBERT S. FURST concerning the barge transactions. Defendant FURST made false statements as to a material matter by stating, among other things,

that he did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the barge transaction.

26. On July 19, 2002, the staff of the Congressional Committee also interviewed defendant DAN O. BOYLE concerning the barge transactions. Defendant BOYLE made false statements as to a material matter by stating, among other things, that he did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the Barge transaction.

27. The staff of the Congressional Committee also sought to interview defendant JAMES A. BROWN concerning the Nigerian barge transactions. Defendant BROWN authorized the submission of information concerning the barge transaction to the Congressional Committee staff. On July 28, 2002, defendant BROWN caused his agents to make false statements as to a material matter by causing them to state, among other things, that BROWN did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the barge transaction.

28. On July 30, 2002, the staff of the Congressional Committee deposed defendant DANIEL BAYLY under oath concerning the barge transaction. Defendant BAYLY testified falsely as to a material matter by testifying, among other things, that he did not know of any oral commitment or guarantee

between Enron and Merrill Lynch relating to the barge transaction.

COUNT ONE
(Conspiracy to Commit Wire Fraud and Falsify Books and Records)

29. The allegations of paragraphs 1 through 28 are realleged as if fully set forth here.

30. In or about and between December 1999 and January 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, WILLIAM R. FUHS, ROBERT S. FURST, and SHEILA K. KAHANEK, along with conspirators Andrew S. Fastow and Ben F. Glisan, Jr., and others conspired to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, all in violation of Title 18, United States Code, Sections 1343, 1346; and (b) knowingly and willfully falsify books, records and accounts of Enron in violation of Title 15, United States Code, Sections 78m(b)(2)(A) & (B), 78m(b)(5)

and 78ff and Title 17, Code of Federal Regulations, Section 240.13b2-1.

OVERT ACTS

31. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, WILLIAM R. FUHS, ROBERT S. FURST, and SHEILA K. KAHANEK and their conspirators did commit and cause to be committed the following overt acts, among others:

a. In late December 1999, FURST caused a document that summarized the proposed Nigerian barge transaction between Enron and Merrill Lynch to be circulated within Merrill Lynch, including in Merrill Lynch's Houston, Texas office; the document stated that defendant BAYLY "will have a conference call with senior management of Enron confirming this commitment to guaranty the ML [Merrill Lynch] takeout within six months" and noted that the proposed return on the transaction would be "$250,000 plus 15% per annum or a flat 22.5% return per annum."

b. In late December 1999, FURST spoke to BROWN concerning the terms of the proposed Nigerian barge transaction between Enron and Merrill Lynch.

c. On or about December 22, 1999, FURST, BROWN and others at Merrill Lynch participated in a meeting to discuss the proposed Nigerian barge transaction.

d. In late December 1999, BROWN assigned FUHS to coordinate closing the Nigerian barge deal and to coordinate with BOYLE at Enron so the deal would close by year end.

e. On or about December 22, 1999, Merrill Lynch executives spoke with BAYLY concerning the proposed Nigerian barge transaction.

f. On or about December 23, 1999, BAYLY spoke on a conference call to Fastow in Houston, Texas, and Fastow promised BAYLY that Enron would take Merrill Lynch out of the deal within six months.

g. On or about December 29, 1999, in Houston, Texas and elsewhere, the defendants caused Enron and Merrill Lynch to finalize their written agreement concerning the Nigerian barge transaction, which did not set forth the oral agreements reached between the parties.

h. On or about the first week in January, in Houston, Texas, KAHANEK, who had worked on the Enron Nigerian barge deal team, severely reprimanded an Enron colleague for creating a written document that reflected oral components of the deal between Enron and Merrill Lynch and ordered the person to destroy evidence of such an oral agreement.

i. On or about June 14, 2000, when Enron had not yet found a third party to buy the barges from Merrill Lynch, FUHS, FURST, BROWN and others caused a letter to Enron to be drafted demanding payment by Enron of the agreed-upon return on its investment in the barges by June 30, 2000.

j. On or about June 14, 2000, in Houston, Texas, Fastow and others arranged for LJM2 to buy Merrill Lynch's investment in the barges, fulfilling the promise by Enron executives to Merrill Lynch that it would be bought out within six months at a rate of return of approximately 22%.

k. On or about June 14, 2000, in Houston, Texas and elsewhere, BOYLE communicated to FUHS that Enron had found a buyer for the barges at the "agreed upon" price.

(Title 18, United States Code, Sections 371 and 3551 *et seq.*)

COUNTS TWO AND THREE
(Wire Fraud)

32. The allegations of paragraphs 1 through 28 are realleged as if fully set forth here.

33. On or about the dates set forth below, each such date constituting a separate count of this Indictment, within the Southern District of Texas and elsewhere, defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, WILLIAM FUHS, ROBERT S. FURST, and SHEILA K. KAHANEK,

having devised a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to defraud, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, specifically those identified below:

Count	**Defendant(s)**	**Date**	**Wire Communication**
2.	DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, WILLIAM FUHS, ROBERT S. FURST, and SHEILA K. KAHANEK	December 29, 1999	facsimile of Merrill Lynch Engagement letter from Enron International, Houston to Merrill Lynch, New York
3.	DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, WILLIAM FUHS, ROBERT S. FURST, and SHEILA K. KAHANEK	June 28, 2000	email from wfuhs@exchange.ml.com (New York) to ace.roman@enron.com. (Houston) forwarding wire instructions for $7,525,000

(Title 18, United States Code, Sections 1343, 1346, 2 and 3551 *et seq.*)

COUNT FOUR

(BROWN: Perjury Before The Enron Grand Jury)

34. The allegations in paragraphs 1 through 15, 17, and 18 are realleged as if fully set forth here.

35. On or about September 25, 2002, in the Southern District of Texas, defendant JAMES A. BROWN, while under oath and testifying in a proceeding before a Grand Jury of the United States, knowingly did make a false material declaration as set forth below.

36. At the time and place stated above, the Enron Grand Jury was conducting an investigation into potential federal criminal offenses relating to the Nigerian barge transactions. It was material to this investigation that the Enron Grand Jury determine all the terms of the agreements, whether written or oral, between Enron, Merrill Lynch, and LJM2.

37. At the time and place stated above, defendant BROWN, appearing as a witness and testifying under oath at a proceeding before the Enron Grand Jury, knowingly made the following declarations in response to questions with respect to matters material to the Grand Jury's investigation (the portions that have been underlined are false):

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A. *It's inconsistent with my understanding of what the transaction was.*

(Tr. at 80, lines 6-11.)

Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: *In – no, I don't – the short answer is no, I'm not aware of the promise.* I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, *and I did not think it was a promise though.*

Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: *No.*

(Tr. at 88, lines 13-23.)

(Title 18, United States Code, Sections 1623 and 3551 *et seq.*)

COUNT FIVE
(BROWN: Obstruction of the
Enron Grand Jury Investigation)

38. The allegations of paragraphs 1 through 15, 17, 18, 36 through 37 are realleged as if fully set forth here.

39. On or about September 25, 2002, in the Southern District of Texas, defendant JAMES A. BROWN did corruptly endeavor to influence, obstruct, and impede the due administration of justice in that BROWN did knowingly and willfully make false and misleading declarations before the Grand Jury with intent to obstruct and impede the Enron Grand Jury investigation.

40. At the time and place stated above, BROWN corruptly endeavored to influence, obstruct, and impede the due administration of justice by giving false and misleading testimony: the declarations which are underscored in Count Four.

(Title 18, United States Code, Sections 1503 and 3551 *et seq.*)

COUNT SIX
(FUHS: False Statements)

41. The allegations of paragraphs 1 through 15, 17, and 19 are realleged as if fully set forth here.

42. On or about October 8, 2003, within the Southern District of Texas, the defendant WILLIAM R. FUHS did knowingly and willfully make materially false, fictitious and fraudulent statements and representations in a matter within the jurisdiction of an agency of the executive branch of the United States Government, to wit, the FBI, in that he stated and represented that he was not aware of any side deal and promise, that is, the side deal and promise described in paragraph 13 of this

superseding indictment, from Enron to Merrill Lynch regarding the Nigerian barge transaction, when in fact, as FUHS then and there well knew and believed, he was aware of such a side deal and promise.

(Title 18, United States Code, Sections 1001(a)(2) and 3551 *et seq.*)

COUNT SEVEN

(FUHS: Obstruction of the Enron Grand Jury)

43. The allegations of paragraphs 1 through 15, 17, 19, and 42 are realleged as if fully set forth here.

44. On or about October 8, 2003, in the Southern District of Texas, defendant WILLIAM FUHS did corruptly endeavor to influence, obstruct, and impede the due administration of justice in that FUHS did knowingly and willfully make false and misleading statements and declarations to Special Agents of the FBI on the Enron Task Force with intent to obstruct and impede the Enron Grand Jury investigation.

45. At the time and place stated above, FUHS corruptly endeavored to influence, obstruct, and impede the due administration of justice by making a false and misleading statement: the declaration set forth in Count Six.

(Title 18, United States Code, Sections 1503 and 3551 *et seq.*)

COUNT EIGHT
(BOYLE: False Statements)

46. The allegations of paragraphs 1 through 15, 24 and 26 are realleged as if fully set forth here.

47. On or about July 19, 2002, within the Southern District of Texas, the defendant DAN O. BOYLE did knowingly and willfully make materially false, fictitious and fraudulent statements and representations in a matter within the jurisdiction of an agency of the legislative branch of the United States Government, to wit, the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate, in that he stated and represented that he was not aware of any side deal and promise, that is, the side deal and promise described in paragraph 13 of this superseding indictment, from Enron to Merrill Lynch regarding the Nigerian barge transaction, when in fact, as BOYLE then and there well knew and believed, he was aware of such a side deal and promise.

(Title 18, United States Code, Sections 1001(a)(2), 1001(c)(2) and 3551 *et seq.*)

SENTENCING ALLEGATIONS

48. With respect to Counts 1-3 of this Indictment,

(a) defendants BAYLY, BOYLE, BROWN, and FURST were organizers or leaders of a

criminal activity that involved five or more participants and was otherwise extensive;

(b) defendant KAHANEK was a manager or supervisor of a criminal activity that involved five or more participants and was otherwise extensive; and

(c) defendants BAYLY, BOYLE, BROWN, FUHS, FURST, and KAHANEK abused their positions of public and private trust, and used special skills, in a manner that significantly facilitated the commission and concealment of the alleged offenses.

49. With respect to Counts 1-3 of this Indictment, and for purposes of calculating the Sentencing Guidelines for Counts 4-8,

(a) the loss exceeded $80 million;

(b) the offenses involved more than minimal planning;

(c) the offenses involved sophisticated means; and

(d) the offenses involved a scheme to defraud more than one victim.

50. With respect to Counts 4-8 of this Indictment, the conduct of defendants BOYLE, BROWN, and FUHS resulted in a substantial interference with the administration of justice.

51. Defendants BAYLY, BOYLE, BROWN, FUHS, and FURST willfully obstructed and impeded,

and attempted to obstruct and impede, the administration of justice during the course of the investigation of the conduct alleged in Counts 1-3 of this Indictment, and defendants' obstructive conduct related to the offenses alleged in Counts 1-3 of this Indictment and related criminal offenses.

Dated: Houston, Texas
July 22, 2004

A TRUE BILL

/s/ Linda Clifton
FOREPERSON

JOSHUA R. HOCHBERG
Acting U.S. Attorney

ANDREW WEISSMANN
Director, ENRON TASK FORCE

By: /s/ Kathryn H. Ruemmler
Matthew Friedrich
John H. Hemann
Kathryn H. Ruemmler
Assistant United States Attorneys
ENRON TASK FORCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20319

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES A. BROWN; DANIEL BAYLY; ROBERT S. FURST; WILLIAM R. FUHS,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CR-363-2

(Filed Aug. 1, 2006)

Before REAVLEY, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal arises from a six-week trial in which the Government charged that Enron and Merrill Lynch employees engaged in a conspiracy and scheme to defraud Enron and its shareholders by "parking" an Enron asset – an equity interest in three power-generating barges moored off the coast of Nigeria –

with Merrill for six months for the purpose of artificially enhancing Enron's 1999 end-of-year earnings report. Merrill agreed to invest $7 million to purchase equity in the barges so that Enron could record $12 million in earnings and meet its forecasts. The Government contended, however, that the sale was a sham because Enron executives orally promised Merrill a flat fee of $250,000 and a guaranteed 15% annual rate of return over the six-month period of Merrill's investment; Enron executives allegedly promised that Enron or an affiliate would buyback Merrill's interest in the barges if no third party could be found. Such a buyback agreement, the Government contended, rendered Merrill's interest in the barges risk-free, meaning that Enron's accounting of the deal as a sale rather than a lease was false. The jury agreed and convicted the appellants of conspiracy and wire fraud. Additionally, appellant Brown was convicted of perjury and obstruction of justice. For the reasons stated below, we reverse the conspiracy and wire-fraud convictions of each of the Defendants on the legal ground that the government's theory of fraud relating to the deprivation of honest services – one of three theories of fraud charged in the Indictment – is flawed. We further vacate appellant Fuhs's conviction on the ground that the evidence is insufficient to support his conviction. Finally, we affirm appellant Brown's convictions of perjury and obstruction of justice.

I

The trial below involved six Defendants. Sheila Kahanek, an accountant by training and a Senior Director in Enron's Asia/Pacific/Africa/China ("APACHI") energy division, was acquitted of all charges against her. Daniel Boyle, an Enron Vice President of Global Finance, was convicted on all counts against him and does not appeal. The following four Merrill Lynch executives (the "Defendants") were convicted on all counts against them and appear before us on appeal: Jim Brown, the head of Merrill's Strategic Asset and Lease Finance Group in New York City; William Fuhs, a Vice President under Brown in the New York office; Daniel Bayly, the head of Merrill's Global Investment Banking division; and Robert Furst, a Merrill executive answering directly to Bayly, responsible for generating business from Enron.

A

The Nigerian barges at the heart of this case were held by Enron's APACHI energy division. At the close of 1999, APACHI was pressured to monetize or sell assets in order to show a gain and meet earnings targets that, in turn, would allow Enron as a whole to meet the company's forecasted earnings for the final quarter of 1999. Various attempts at selling APACHI's primary asset, the barges, to an industry buyer were made in the final months of 1999, but each prospective deal collapsed. In early December 1999, Enron executives discussed the need for an "emergency

alternative." When executives were informed that the barges would not be sold by year's end, they responded that a "friend of Enron," Merrill Lynch, might be able to buy the barges and "help Enron out."

In late December, Enron approached Merrill about buying the barges. Boyle discussed the deal with Furst, Merrill's Enron relationship manager. Furst communicated with others at Merrill, including Bayly, Brown, and Schuyler Tilney, the head of banking in Merrill's Houston office. Furst explained that Enron's then-Treasurer, Jeff McMahon, "asked Merrill to purchase $7 [million] of equity in a special purpose vehicle that will allow Enron to book $10 [million] of earnings. The transaction must close by 12/31/99. Enron is viewing this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months. The investment would have a 22.5% return." Furst emphasized the importance of fostering an ongoing business relationship with Enron and that the deal offered Merrill a chance to differentiate itself from other investment banks. When Furst explained the deal to Katherine Zrike, chief counsel for Merrill's Global Investment Banking, Zrike noted her concern due to the year-end nature of the deal, its unique quality, and a lack of due diligence.[1]

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[1] On December 1, 1999, Merrill reissued its policy, warning of problematic end-of-year transactions by clients seeking to show gains or losses prior to the end of the year. "Clients wishing to effect a sale and then reestablish a position must be

(Continued on following page)

Furst and Brown communicated by fax regarding the deal, and Brown noted his concerns: "Enron credit/performance risk," a lack of "repurchase oblig. from Enron," and the "reputational risk" of "aid[ing]/abet[ting] Enron income stmt. manipulation." Brown also communicated his concerns to Fuhs, who in turn communicated the risks, including the risk of aiding Enron with "income manipulation," to Tina Trinkle, an analyst. Due to these concerns, the short timeline, and a lack of information about the deal, some Merrill employees, including Trinkle, thought the deal would not go through.

According to the Government, the barge deal proceeded because Enron agreed that either it or an affiliate would repurchase the barges from Merrill if a third-party buyer could not be found and that Enron would pay a fixed rate of return for the duration of Merrill's hold of the interest in the barges. Ben Glisan, a colleague of Boyle's and a Government witness, testified that multiple sources informed him of Enron's oral guarantee that Merrill would be taken out of the transaction within six months for a set return on the investment.

On December 22, Bayly, Brown, Furst and others (excluding Fuhs and any lawyers) participated in a conference call about the deal (the "Trinkle call").

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advised that there can be no prearrangement as to the availability of the financial instrument or the specific purchase price, if and when the client decides to reestablish the position."

Furst and Tilney explained that Enron needed to sell the barges by year-end in order to book additional earnings in 1999 and that someone at Enron indicated that Enron would agree to take Merrill out at a fixed rate of return. Bayly asked for a written assurance to support Enron's promise, and someone responded that a writing was not possible because such an assurance would prevent Enron from receiving the accounting treatment it sought with the deal. But either Furst or Tilney responded that Enron had given its strongest verbal assurances that Merrill would not own the barges after June 30. That same day, Brown and Fuhs received an e-mail from Furst's office in Dallas, describing some of the material terms of the deal including that Bayly would confirm Enron's promise with senior Enron management. In a later meeting with Furst that day, Zrike warned that for Enron to show the sale as a profit on its books, Merrill would have to own the barges outright without any buyback agreement. Furst stated that the agreement contemplated only Enron's attempt to remarket the barges. Zrike restated her concerns in afternoon meetings with Bayly on December 22, where the Government alleges Bayly had a duty, under Merrill's policy, to disclose his awareness of Enron's buyback promise to Zrike but failed to do so. At the end of the day on December 22, Furst e-mailed Boyle to announce the conference call between Bayly and Enron management –Andrew Fastow, McMahon, and Boyle – for 9:30 the next morning.

According to Government witness Eric Boyt, an accountant for APACHI, both Fastow and Boyle said that during the conference call, Fastow promised that Merrill would not own the barges for longer than six months and that if Enron could not facilitate a buyer, it would "guarantee a 15 percent buyback within six months." In this vein, Boyle authored an e-mail explaining the transaction as follows: "[Merrill's] decision to purchase the equity was based solely on personal assurances by Enron senior management to [Merrill] that the transaction would not go beyond June 30, 2000." Although Brown was not on the December 23 conference call, the Government alleges that he understood Fastow's promise on Enron's behalf; this allegation is supported by Brown's later e-mail of March 2001, describing a similar, prospective deal: "I would support an unsecured deal provided we had total verbal assurances from [the company's C.E.O. or C.F.O.]. . . . We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well."

Following this call, the initial draft of the "engagement letter" for the deal, including reference to Enron's oral buyback promise, was circulated. On December 28, Boyle sent out a revised version of the engagement letter, with "strike-through" indicating proposed removal of the language about the annual rate of return and that Merrill's interest would be subsequently sold or repurchased by Enron or an

Enron affiliate. Another draft, with the oral promises redacted entirely, was circulated shortly thereafter and signed by Brown and Fastow.

At the end of 1999, Enron recorded the barge deal and booked from it $12,563,000 in earnings. The Government argues this booking was a false entry because Merrill's investment was never at risk in the light of the guaranteed buyback, advisory fee, and fixed rate of return. These oral but material terms, according to the Government's witnesses, required that the deal be booked as a loan rather than as a sale.

The Government further asserted that the parties' conduct, between the end of 1999 and June 2000, was consistent with Enron's oral promise to buy back the parked barges from Merrill: Enron wired a $250,000 "advisory fee" to a Merrill account at Citibank even though Brown testified that Merrill did not provide advisory services; Merrill did not monitor Enron's attempts to remarket the barges during the interim period; efforts to remarket the barges on APACHI's behalf were motivated by a desire to preclude Enron from having to repurchase them from Merrill; Enron contacted Furst seeking an extension of the deadline; and Merrill drafted for Furst's signature a letter to Enron demanding that Enron purchase the barges by June 30 for $7,510,976.65, a number that was consistent with the terms of the oral guarantee. Before the letter left Merrill, however,

Fuhs contacted Furst and told him that Enron had lined up a buyer, an entity called LJM2.[2] LJM2 served as a temporary warehouse for Enron assets, according to Glisan's testimony, and was not wholly independent from Enron.

Merrill and LJM2 closed the deal for the re-sale on June 29, 2000, when LJM2 paid Merrill $7,525,000 for its interest in the barges.[3] That figure represented exactly six-months' return at a rate of 15% annually. Including the $250,000 "advisory fee" received at the end of 1999, Merrill made $775,000 on its investment in the barges. At the close of the deal, Fuhs e-mailed Brown and Furst to inform them that the money had been paid to Merrill and referred to the fact that Brown and Furst (along with Bayly) were investors in LJM2 and as such still bore an interest in the barges.

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[2] Brown, Bayly, Furst, and other Merrill employees invested in a Merrill partnership which in turn invested in LJM2. Brown invested $32,500 of the $400 million LJM2 fund; Furst and Bayly each invested $130,000.

[3] In turn, the plan was for LJM2 to also flip the interest in the barges after the end of 2000 so that Enron would not have to show that the profits earned in 1999 were "unwound." In return for Enron's use of LJM2's balance sheet in this manner, Enron was to pay LJM2 a flat $350,000 fee and a 15% annual rate of return for the period it held the barges, and ensure that LJM2 would be taken out of the investment by January 15, 2001. An industry buyer, an energy company, ultimately bought the barges during the period LJM2 held the barges; tellingly, this ultimate buyer conducted purchase negotiations with APACHI, not with LJM2 which held the barges in name.

B

The Government charged all six Defendants with one count of conspiracy and two counts of wire fraud. The conspiracy count alleged a conspiracy under 18 U.S.C. § 371 to commit wire fraud in violation of § 1343 (the "money or property" charge) and § 1346 (the "honest services" charge), and to falsify Enron's books and records in violation of 15 U.S.C. § 78m(b)(2), (b)(5) and 78ff, and 17 C.F.R. § 240.13b2-1 (the "books and records" charge). The substantive wire fraud counts were based upon two interstate transmissions between Houston and New York. The Government also charged Brown with perjury before a Grand Jury in violation of 18 U.S.C. §§ 1623 and 3551, and with obstruction of a Grand Jury investigation in violation of 18 U.S.C. §§ 1503 and 3551.

The six Defendants were tried together by jury over six weeks. At the close of the Government's case in chief, each Defendant moved for a judgment of acquittal under Rule 29(a), claiming that the Government's evidence was insufficient to sustain a conviction on any count of the Indictment. The district court reserved ruling on the motions under Rule 29(b). Boyle and the appealing Defendants were convicted of the conspiracy and wire fraud counts; Kahanek was acquitted. Brown was additionally convicted on the perjury and obstruction counts. The Defendants renewed their motions for acquittal, and the court denied the motions in the light of "substantial evidence justifying an inference of guilt with respect to each." Brown was sentenced to 46 months' imprisonment;

Bayly was sentenced to 30 months' imprisonment; and Furst and Fuhs were each sentenced to 37 months' imprisonment.

II

The Defendants raise numerous issues on appeal. The Defendants' broadest attack on their convictions suggests that, even if the Government proved all the allegations in the Indictment, the alleged scheme would not run afoul of the wire fraud statutes – there was no deprivation of Enron's intangible right to the honest services of its employees, and there was no scheme to defraud Enron and its shareholders of money or property. The Defendants also claim that the crime of conspiracy does not apply to the falsification of a corporation's books and records because of explicit statutory language to that effect. 15 U.S.C. § 78m(b)(2), (b)(5) and 78ff. The Defendants raise numerous further claims regarding 1) jury instructions on the theory of the defense, good faith, and the materiality requirement of the books-and-records charge; 2) evidentiary and related rulings, most notably, admission into evidence of an inculpatory e-mail by Brown, allowance of testimony as to Furst's belief that the barge deal included an Enron guarantee, exclusion of an expert witness on accounting standards, failure of the court to order disclosure of allegedly exculpatory evidence in the form of details of Fastow's interview with the FBI, and exclusion of impeachment evidence in the form of contradictory statements by Fastow; 3) the denial of their

individual motions for acquittal and the sufficiency of the evidence supporting their convictions; and 4) the calculation of their sentences. Brown additionally appeals the legal and factual sufficiency of the evidence supporting his convictions for perjury and obstruction of justice, and Fuhs additionally alleges prosecutorial misconduct in the form of a repudiation of a stipulation pertaining only to him.

Because we hold that the honest-services theory of wire fraud does not extend to the circumstances as contended by the Government, we vacate the conspiracy and wire-fraud convictions. We therefore do not reach the remaining issues, with the exception of the denial of the Defendants' motions for acquittal, which we reverse only as to Fuhs, and Brown's appeal of his separate perjury and obstruction convictions, which we affirm.

III

A

We begin with the Defendants' broad attack on the legal sufficiency of the Government's assertion of criminal liability. We review the legal sufficiency of an Indictment *de novo*. *United States v. Caldwell*, 302 F.3d 399, 407 (5th Cir. 2002).[4]

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[4] The Government notes some confusion as to whether the Defendants' argument challenges the legal sufficiency of the Indictment or the sufficiency of the jury instructions. If the latter,

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The Indictment charged the Defendants with one count of conspiracy and two substantive counts of wire fraud. The conspiracy count alleged a conspiracy to violate two different statutes. The first statute is the wire-fraud statute, 18 U.S.C. § 1343, which reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Following the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), that § 1343 only protects "money or property" and not an employer's or the public's right to the honest services of employees and public officials, Congress added § 1346, which reads:

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the Defendants' failure to object during the charge conference would render our standard of review one for plain error. However, it is clear the Defendants mount a facial challenge to the Indictment, and the Government accepts the propriety of *de novo* review.

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Thus, the conspiracy count recited two objects of the alleged conspiracy to commit wire fraud, namely, the fraudulent deprivation of Enron's intangible right to the honest services of its employees, and the fraudulent deprivation of Enron's money or property. The second criminal statute is 15 U.S.C. § 78ff, which punishes

> [a]ny person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder. . . .

Thus, the conspiracy count alleged violation of the requirements set forth in 15 U.S.C. § 78m(b)(2), (5) and 17 C.F.R. § 240.13b2-1.[5]

Because the jury was not asked to indicate the basis for its verdict, the Government must prove all

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[5] "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act." 17 C.F.R. § 240.13b2-1.

three theories in order for us to affirm the convictions. *Yates v. United States,* 354 U.S. 298 (1957). The Defendants argue that the Government has proved *none* of the three theories it alleges in the Indictment.

B

Wire fraud is (1) the formation of a scheme or artifice to defraud, and (2) use of the wires in furtherance of the scheme. See *Pereira v. United States,* 347 U.S. 1, 8 (1954); *United States v. Caldwell,* 302 F.3d 399, 406 (5th Cir. 2002). Violation of the wire-fraud statute requires the specific intent to defraud, i.e., a "conscious knowing intent to defraud," *United States v. Reyes,* 239 F.3d 722, 736 (5th Cir. 2001); however, specific intent to defraud need not be charged in the Indictment.

Honest-services wire fraud is wire fraud in which the scheme or artifice to defraud "deprive[s] another of the intangible right of honest services." 18 U.S.C. § 1346. This provision can be understood only in the light of the long history of the mail- and wire-fraud statutes, which were intentionally written broadly to protect the mail and, later, the wires from being used to initiate fraudulent schemes. *See McNally,* 483 U.S. at 356. Over time, the lower courts came to construe the fraud statutes to protect not just money and property but also intangible rights such as the right

to privacy,[6] and the right to honest services of employees and public officials. In *McNally,* however, the Supreme Court excised the protection of intangible rights from the scope of §§ 1341 and 1343, holding that the statutes as written protected only money and property. The Court explained that the 1909 amendment adding "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was meant to confirm that liability covered not just fraudulent misstatements about existing facts but also fraudulent promises and representations about the future. Congress's use of the disjunctive in specifying "obtaining money or property" as an object of the fraud was not meant to expand the criminal statute beyond the protection of money and property. *Id.* at 358-60. Congress responded by passing § 1346, which reads in its entirety, "A 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. As we and other courts have held, § 1346 was clearly meant specifically to overturn *McNally,* at least with respect to the particular intangible right named in the statute, i.e., the right to honest services. *See United States v. Brumley,* 116 F.3d 728, 733 (5th Cir. 1997) (en banc); *United States v. Rybicki,* 354 F.3d 124, 134, 136-37 (2d Cir. 2003). Thus, the meaning of honest

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[6] *See, e.g., United States v. Condolon,* 600 F.2d 7 (4th Cir. 1979); *United States v. Louderman,* 576 F.2d 1383 (9th Cir. 1978).

services – given that the statute provides no perimeters – is to be found in the pre-*McNally* case law. *Brumley,* 116 F.3d at 733; *Rybicki,* 354 F.3d at 136-37.

We have previously undertaken the task of considering the pre-*McNally* case law. Thus, we have written, "'Honest services' are services owed to an employer under state law," including fiduciary duties defined by the employer-employee relationship. *Caldwell,* 302 F.3d at 409; *Brumley,* 116 F.3d at 734. In order that not every breach of fiduciary duty owed by an employee to an employer constitute an illegal fraud, we have required some detriment to the employer. *United States v. Ballard,* 663 F.2d 534, 540 (5th Cir. 1981). *Ballard,* however, implies that breach of the duty to disclose material information is a sufficient detriment to the employer because the materiality requirement, added to the false disclosure or nondisclosure of information, contemplates that the undisclosed information would have led a reasonable employer to change its business conduct. *Id.* at 541; see also *Rybicki,* 354 F.3d at 145.[7] Here, the Government alleged not only the harm inherent in the failure to disclose material information – that the barge transaction presented no risk to Merrill because of the oral side deal – but also concrete harms to Enron in the form of fees paid to Merrill to effect

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[7] The Government must allege materiality in the Indictment, but failure to do so is not fatal "if the facts alleged in the Indictment warrant an inference of materiality." *Caldwell,* 302 F.3d at 409.

the deal and compensation bonuses paid to Enron employees that depended on the completion of the barge deal.

The Seventh Circuit has additionally held that honest-services fraud requires some personal benefit accruing to the duty-breaching employee. *United States v. Bloom,* 149 F.3d 649 (7th Cir. 1998). Here, those same bonuses would likely constitute such a personal benefit accruing to the Enron employees taking part in the alleged scheme.

Thus, the Government presents a very plausible, even strong, case for a criminal deprivation of honest services, alleging a fiduciary breach – the failure to disclose the full truth about the barge transaction – that resulted in both a personal benefit (increased bonus) to the duty-breaching Enron employees and detriments (but also benefits) to the corporation itself.[8]

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[8] The Government's contention that Enron suffered a detriment is not trouble-free. The breach in question resulted in an increase in Enron's stock price, an immediate benefit Enron specifically sought. The Defendants indeed argue explicitly that their actions benefitted the company for this very reason. Certainly, from a practical and short-term perspective, this is true. The Government claims that the detriment was Enron's spending money (in the form of fees paid to Merrill and bonuses paid to employees) for the "sole purpose of misleading shareholders and the investing public." This theory is not fully convincing absent the implicit claim that this specific deal led to Enron's unraveling, a causal connection for which there is no substantiated support. Nevertheless, we will assume for

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Nevertheless, the Defendants put forth an equally plausible argument that the limiting statements we have expressed in our past cases do not demarcate the exact outer-most boundaries of honest services. Instead, those limiting statements represent only minimal distinctions we have had *occasion* to declare, and thus they do not exhaust the constraints that are appropriate to recognize. Thus, for example, we noted in *Brumley* that "the boundaries of 'intangible rights' may be difficult to discern, but that does not mean that it is difficult to determine whether Brumley in particular violated them." *Brumley,* 116 F.3d at 733. If we are not to lapse into defining a common law crime, the outer boundary of this facially vague criminal statute must be determined from the factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases.[9] In essence, the Defendants argue that between the core of cases affirming honest-services fraud convictions and the shell of cases reversing them, there is a gap, a lacuna, a vacuum, a no-man's land, a demilitarized zone, in which this case awkwardly sits alone.

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purposes of this opinion that the alleged detriment satisfies that element of honest-services fraud.

[9] Put another way, the Defendants argue that the scope of honest-services fraud is defined by the set of cases in which convictions have been upheld, not by the complement of the set of cases in which convictions have been reversed.

Appraising this argument requires a study of the case law to understand what behavior justifies criminal liability. We begin by noting that the Government urges the broadest reading by relying on the barest reiteration of the few constraints we have previously acknowledged, even going so far as to argue that no detriment aside from the fiduciary breach itself is necessary because "it is sufficient for the government to show that the defendants violated a duty imposed by state law. . . . The plain text of Section 1346 . . . does not require any detriment . . . beyond proof that the scheme or artifice to defraud 'deprive[d] another of the intangible right of honest services.'" Given our repeated admonition that "not every breach of fiduciary duty works a criminal fraud," *see Ballard,* 663 F.2d at 540 (quoting *United States v. George,* 477 F.2d 508, 512 (7th Cir. 1973)), we consider such a broad theory of liability with caution.[10]

Turning to the case law, we are guided by the leading opinion on honest-services fraud, the Second Circuit en banc decision in *Rybicki, supra. Rybicki* concluded, and we agree, that cases upholding convictions arguably falling under the honest services

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[10] It is also worth noting that the Government's argument is somewhat circular, relying as it does on the statutory text's use of the term "honest services." As already stated, the statute itself provides not a hint of the definition of the term; instead, it is the case law that establishes the meaning of the vague and amorphous phrase.

rubric can be generally categorized in terms of either bribery and kickbacks or self-dealing. The great weight of cases are clear examples of such behavior.[11] The Second Circuit formulated the following rule based on its analysis:

> [A] scheme or artifice to deprive another of the intangible right to honest services in section 1346, when applied to private actors, means a scheme or artifice . . . to enable an officer or employee of a private entity . . . purporting to act for and in the interests of his or her employer . . . secretly to act in his or her or the defendant's own interests instead. . . .

Rybicki, 354 F.3d at 141-42.[12] Our circuit's analysis has not been much different from *Rybicki*'s, although

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[11] *See Rybicki*, 354 F.3d at 139-44. For bribery/kickback cases, *see United States v. Schwartz*, 785 F.2d 673 (9th Cir. 1986); *United States v. Price*, 788 F.2d 234 (4th Cir. 1986); *United States v. George*, 477 F.2d 508 (7th Cir. 1973); *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975); *United States v. Hasenstab*, 575 F.2d 1035 (2d. Cir. 1978); *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980); *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982). For examples of self-dealing cases, *see Ballard; Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949); *United States v. McCracken*, 581 F.2d 719 (8th Cir. 1978); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980).

[12] Note that the Second Circuit dissenters dissented not from the narrowness of the construction but from the decision to uphold the statute at all. They would have struck down honest-services fraud as facially vague, emphasizing that "'the average

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perhaps we have couched our language more broadly in terms of an understood *divergence*, rather than a secret *conflict*, of interests. Thus, in *Brumley*, although we recognized that bribery and self-dealing are the paradigmatic cases of honest-services fraud, we wrote:

> 'honest services fraud' contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer – or that he consciously contemplated or intended such actions. For example, something close to bribery.

Brumley, 116 F.3d at 734.

While it may be argued that the Defendants here were conscious of the fact that their actions were "something less than in the best interests of the employer," at least long term, that argument relies on the presumption, inherent in the Government's insistent argument, that a fiduciary breach is itself a sufficient reflection of interest divergence. But that view encompasses every knowing fiduciary breach, and we meet again our oft-mentioned chariness of making every knowing fiduciary breach a federal crime. What makes this case exceptional is that, in

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citizen . . . must be forewarned and given notice that certain conduct may subject him to federal prosecution.'" 354 F.3d at 159 (Jacobs, Circuit Judge, dissenting) (quoting *Brumley*, 116 F.3d at 745-46 (Jolly and DeMoss, Circuit Judges, dissenting)).

typical bribery and self-dealing cases, there is usually no question that the defendant understood the benefit to him resulting from his misconduct to be at odds with the employer's expectations. This case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest.

Here, the private and personal benefit, i.e. increased personal bonuses, that allegedly diverged from the corporate interest was itself a promise of the corporation. According to the Government, Enron itself created an incentive structure tying employee compensation to the attainment of corporate earnings targets. In other words, this case presents a situation in which the employer itself created among its employees an understanding of its interest that, however benighted that understanding, was thought to be furthered by a scheme involving a fiduciary breach; in essence, all were driven by the concern that Enron would suffer absent the scheme. Given that the only personal benefit or incentive originated with Enron itself – not from a third party as in the case of bribery or kickbacks, nor from one's own business affairs outside the fiduciary relationship as in the case of self-dealing – Enron's legitimate interests were not so clearly distinguishable from the corporate goals communicated to the Defendants (via their compensation incentives) that the Defendants

should have recognized, based on the nature of our past case law, that the "employee services" taken to achieve those corporate goals constituted a *criminal* breach of duty to Enron. We therefore conclude that the scheme as alleged falls outside the scope of honest-services fraud.

We do not presume that it is in a corporation's legitimate interests ever to misstate earnings – it is not. However, where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.[13]

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[13] The Government cites one precedent that lies outside the bulk of the honest-services case law and addresses a situation arguably similar to the instant case. In *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), university basketball coaches were convicted of mail and wire fraud for fraudulently establishing the academic eligibility of transfer students recruited to play on the basketball team. The court, relying on *Ballard*'s suggestion that a non-disclosure of material information is itself sufficient harm to the employer, rejected the defendants' argument that their actions furthered the fortunes of the basketball team and of the university and were therefore not within the purview of fraud statutes.

The Government argues, quite plausibly, that *Gray* is similar enough to this case to dispose of the Defendants' challenge, because the principal argument of the Defendants is that they believed their actions would benefit Enron. But *Gray* is distinguishable both factually and legally. *Gray* is dissimilar to this

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Therefore, the Government must turn to other statutes, or even the wire fraud statutes absent the component of honest services, to punish this character of wrongdoing.

This opinion should not be read to suggest that no dishonest, fraudulent, wrongful, or criminal act has occurred. We hold only that the alleged conduct is not a federal crime *under the honest-services theory of fraud specifically.* Given our repeated exhortation against expanding federal criminal jurisdiction

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case in part because the opinion recognizes nothing akin to Enron's corporate incentive policy coupled with senior executive support for the deal (the deal was sanctioned by Fastow, Enron's Chief Financial Officer), which together created an understanding that Enron had a corporate interest in, and was a willing beneficiary of, the scheme. The opinion in *Gray* presents only the coaches' own belief that their scheme benefitted the university; no one or any authority outside the cadre of coaches encouraged, approved, or even knew of the wrongdoing. Moreover, the *Gray* court did not appear to have before it the limiting arguments presented here based on *Rybicki* (decided years after *Gray*). Thus, without attempting to call into question the result in *Gray,* we limit it to its facts, since applying the wire fraud statute here, even if it requires no new explicit statement of law, would expand honest-services fraud to reach all manner of accounting fraud and securities fraud, which have not generally been prosecuted as honest-services fraud and are heavily regulated under other statutes. The Government, in fact, would go even further; it plainly stated at oral argument its position, explicitly based on *Gray,* that the honest-services charge would reach the Defendants' conduct *even absent an oral buyback agreement.* The Government's desire to *build* on *Gray* crystalizes the danger we face of defining an ever-expanding and ever-evolving federal common-law crime.

beyond specific federal statutes to the defining of common-law crimes, we resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases. Instead, we apply the rule of lenity and opt for the narrower, reasonable interpretation that here excludes the Defendants' conduct. *See McNally*, 483 U.S. at 360.

In sum, the convictions of each of the Defendants for conspiracy and wire fraud cannot be upheld on the basis of the honest-services theory and must be vacated per *Yates*, *supra*. We therefore need not address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges). Nor need we speak to the procedural errors alleged by the Defendants. Instead, we turn to two remaining issues: the Defendants' motions for acquittal and Brown's conviction for perjury and obstruction of justice.

IV

A

We first consider the District Court's denial of Fuhs's Motion for Judgment of Acquittal, which Fuhs submitted at the close of the Government's case-in-chief. Fuhs contends that the evidence in the Government's case-in-chief is insufficient to support a conviction.

Review for sufficiency where, as here, the motion was renewed at the close of the evidence is *de novo,* meaning that "'we determine whether . . . a rational jury could have found the essential elements of the offense beyond a reasonable doubt.' *United States v. Dean,* 59 F.3d 1479, 1484 (5th Cir. 1995)." *United States v. Alarcon,* 261 F.3d 416, 421 (5th Cir. 2001). As Fuhs notes, because the District Court reserved ruling on the motion, appellate review is limited to the evidence presented in the Government's case-in-chief. *United States v. Rhodes,* 631 F.2d 43, 44-45 (5th Cir. 1980). Thus, we ought not consider the Government's rebuttal evidence alleging that Fuhs lied on the witness stand and that he may have edited, or even authored, a key document – the Appropriation Request (Govt. Exhibit 850.1) – in the prosecution's case against all the Defendants.

The Government's case-in-chief against Fuhs consisted entirely of documents and e-mails, plus excerpts from Fuhs's statements before the SEC from 2002. The Government admits that none of its witnesses testified about Fuhs's knowing participation in the alleged scheme and that Fuhs was absent from the critical calls and meetings that allegedly put the Merrill Defendants on notice of Enron's intention to account improperly for the barge transaction. Thus, the Government relies solely on the documentary evidence to assert Fuhs's knowledge of the oral buyback promise and his intent to participate in the scheme to conceal that promise for the purpose of effecting a misaccounting of the overall deal.

We find that the documentary evidence fails to sustain the Government's burden of proof beyond a reasonable doubt. Much of the Government's evidence consists of e-mails or memos not written or initiated by Fuhs, not directly addressed to him, and in some cases not even copied to him. They neither recognize a secret oral side deal nor imply that the addressees of the correspondence knew of such a secret deal. While they may support the assertion that Fuhs knew Merrill wanted a buyback agreement to protect its investment, and that it was at one point understood to be part of the deal by Fuhs's subordinate Geoffrey Wilson, the principal documents relied upon by the Government simply do not sustain the inference that Fuhs had knowledge of an oral guarantee that was to be kept out of the written agreement and kept secret in (because it conflicted with) the accounting of the deal.

Fuhs's list of transactional risks was only a transcription of Brown's list to be passed along to analysts and executives. It reveals nothing regarding Fuhs's understanding of Enron's intent to misrepresent the transaction. The list does not reveal the existence of a secret buyback promise or an intent to defraud; in fact, the *absence* of a promise securing Merrill's investment is noted. Brown's suggestion, passed on by Fuhs, that Merrill might face reputational risk for aiding income manipulation does not imply the specific understanding that such income manipulation was to be effected by deception and fraudulent accounting. The Government's claim that

"Fuhs would soon find out, if Brown had not already told him, that Enron was 'selling' the barges only so that it could book $12 million in earnings by the end of 1999," is neither here nor there – selling an asset quickly to book earnings by a certain date is not, by itself, fraudulent.

The Government, however, asserts that certain other documents, especially a series of revisions of the engagement letter representing the transaction, show Fuhs's knowledge of an intent to further a fraudulent accounting of the deal. The Government's inferences are deficient for two reasons. First, the revisions of the engagement letter and other pre-deal memos received by Fuhs suggest no more than an understanding that a buyback agreement was desired by Merrill and was at some point, but not ultimately, a part of the proposed deal. It is an unacceptable stretch to conclude from these documents that Fuhs had knowledge that the transaction ultimately included an oral promise to be kept secret from the lawyers and accountants in order to effect a fraudulent accounting. The fact that Fuhs forwarded to Merrill lawyers a black-lined version of the edited engagement letter in which mention of a buyback was redacted is only damning to Fuhs if one assumes he was aware that the buyback guarantee remained part of the deal. But the documents do not establish, nor does any other evidence establish, that Fuhs knew the buyback obligation survived the redaction such that the absence of references would suggest concealment. The Government cannot simply assume the

linchpin of its case against Fuhs; yet it repeatedly frames documents as inculpatory by presuming that Fuhs knew of the oral promise and concluding that he willfully concealed the promise in furtherance of the deception. Second, whatever understanding these documents do reveal, such understanding is principally that of the primary communicants of the correspondence, namely, Wilson, Furst, and Boyle. The fact that Fuhs is copied on a stream of e-mails documenting the transaction is far from sufficient to support inferences that he knew of the details of an oral side agreement that survived the removal of written references to it.

The Government also produced evidence stemming from six months after the initial transaction, when Merrill was getting rid of its purported equity interest. Fuhs wrote that he had spoken to Boyle and that Enron had lined up a new buyer to purchase Merrill's interest "for the agreed upon amount outlined in the previously forwarded memo." This e-mail fails to prove anything other than that Fuhs became aware of Enron's procurement of a third-party buyer to take Merrill out of its purported equity interest. Even when taken together with the remainder of the evidence against Fuhs, the e-mail demonstrates neither the knowledge of a secret repurchase obligation owed by Enron nor the specific intent to defraud by the concealment of that obligation. Nor does Fuhs's jocose reply, "only if i can guarantee a make-whole at par + return in case of civil unrest/war," to Brown's query, "wanna buy a barge?", after Merrill

had sold its stake but Brown was still exposed because of his involvement in LJM2, add much evidence of the requisite knowledge and the specific intent of Fuhs to defraud in the purchase of the barge six months earlier.

As counsel for Fuhs noted at oral argument, if we begin with the assumption that Fuhs is guilty, the documents can be read to support that assumption. But if we begin with the proper presumption that Fuhs is not guilty until proven guilty beyond a reasonable doubt, we must conclude that the evidence is insufficient to prove beyond a reasonable doubt that Fuhs had the knowledge and intent to enter into the fraudulent scheme alleged by the Government.

Ultimately, we do not have to conclude that Fuhs was an innocent in the deal to relieve Enron of the barges. We only conclude that at the close of its case, the Government had failed to support its charges against Fuhs with sufficient evidence of guilty knowledge, as charged in the Indictment, to survive his motion for judgment of acquittal.

B

Regarding the other Defendants' motions for acquittal, we have reviewed the record and are satisfied that the Government's evidence was not so patently deficient that a judgment of acquittal was required as a matter of law.

V

We turn finally to Brown's convictions for perjury and obstruction of justice. These charges stem from testimony Brown gave to the grand jury investigating the barge transaction in the fall of 2002. The Government charged that Brown's testimony concerning the agreement between Enron and Merrill was perjurious and ultimately constituted obstruction of justice. The jury agreed and convicted Brown under 18 U.S.C. § 1623 of one count of perjury, and under 18 U.S.C. § 1503 of one count of obstruction of justice. We affirm these convictions.

A

18 U.S.C. § 1623 defines perjury as "knowingly mak[ing] a false material declaration" to a grand jury. The Government charged Brown with one count of perjury, contending that Brown knew or understood that Enron promised to remove Merrill from the barge deal by June 30, and that Brown perjuriously denied under oath any such knowledge or understanding.[14] The Indictment quotes the following testimony by Brown as constituting perjury (the underlining

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[14] Specifically, the Indictment alleges that "[w]hile under oath, Defendant BROWN testified falsely as to a material matter by stating, among other things, that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction."

is in the original and indicates the portions alleged to be false):[15]

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[15] The portion of the testimony from which the excerpts in the Indictment were taken is as follows:

Q: Do you see where it [e-mail from Boyle, Grand Jury Exhibit 11] says, "To be clear, Ene. (Enron) is obligated to get Merrill out of the deal on or about June 30th?"

A: Yes, sir.

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A: It is inconsistent with my understanding of what the transaction was.

. . . .

Q: . . . And the question to you is do you have any understanding as to whether – how or why – Enron would believe that it was – it understood that it was required . . . to get Merrill Lynch out of the deal by June 30th?

A: I did not understand – you know, my understanding of the transaction was that they were not required to get us out of the transaction, but we made it clear to them that we wanted to be out of it by June 30th.

. . . .

Q: Now, do you see in this E-mail [still discussing Grand Jury exhibit 11] where it says, "And someone should be working on a backstop, as you will not be able to extend Merrill, and I understand that there are accounting ramifications if Enron repurchases"?

Now, do you have any understanding about whether or not Merrill could extend past June 30th?

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A: I don't know anything about that.

Q: Okay. And under – if it was a true sale and if Merrill purchases something, there would be no extension needed. I mean Merrill has the asset and until somebody comes along and buys it, they have it; correct?

A: Correct.

. . . .

Q: Now, do you see in this document [LJM-2 document, Grand Jury Exhibit 18] . . . in the first sentence where it says, "Enron sold barges to Merrill Lynch in December of 1999, promising that Merrill would be taken out by sale to another investor by June 2000."

Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: In – no, I don't – the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

Q: So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?

A: No.

. . . .

Q: [Discussing America's Credit Flash Report for the week ending 12/23/99, Grand Jury Exhibit 9] And let me now direct your attention to the paragraph on the Nigerian barge project.

Now, do you see where it says . . . , "IBK [Merrill] was supportive based on Enron relationship, approximately $40 million in annual revenues, and assurances from Enron management

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that we will be taken out of our $7 million investment within the next three to six months."

Does that accord with your understanding of the transaction?

A: No. I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort.

If assurance is synonymous with guarantee, that is not my understanding.

If assurance is interpreted to be more along the lines of strong comforts or use of best efforts, that is my understanding.

Q: [Discussing the Merrill appropriation request for the Enron/Merrill barge transaction, Grand Jury exhibit 7] . . . Do you see where it says, "Take out," where it says, "project start/finish," and it says, "Needs to close by 12/31/99"? And I'd for now like to focus on the part where it says, "Take out by June 30th, 2000."

A: Yes, sir.

Q: Does that comport with your understanding of the transaction, that the finish of the project was June 30th of 2000 when there would be a take out?

A: You know, "take out" could mean that the anticipated time frame of the investment runs through that period, or in my mind it could, or it could mean some sort of legal take out. So I really – I can't draw a conclusion from just those words.

Q: Do you see where it says "maturity"? . . .

A: Yes.

Q: And its says "less than 6 months"?

A: Yes.

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Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A: *It's inconsistent with my understanding of what the transaction was.*

. . . .

Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: *In – no, I don't – the short answer is no, I'm not aware of the promise.* I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, *and I did not think it was a promise though.*

Q: Do you have any understanding why it would say "less than six months" if the terms of the agreement are open-ended?

A: Well, I'd be speculating but I would assume that that would reflect – at least my understanding or whoever wrote this's understanding, that the anticipated hold period was less than six months.

Q: But if the contract between the parties is an open-ended investment, why does the maturity just say less than six month[s] when the terms of the contract bring Merrill Lynch well beyond six months?

A: I don't know.

Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: *No.*

Brown makes three primary arguments: first, that he testified truthfully as to his subjective understanding of the barge deal; second, that the questions posed to him before the grand jury were too "vague and ambiguous" to support a perjury conviction; and third, that any misrepresentations by Brown were not material and thus cannot sustain a conviction under 18 U.S.C. § 1623. Each of these arguments is properly characterized as an attack on the sufficiency of the evidence.[16] Consequently, "[w]e ask whether a rational trier of fact could have found that the evidence established the elements of the offense

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[16] Brown mischaracterizes his challenges as a legal sufficiency challenge, which we would review *de novo*. It is clear, however, that Brown's challenge is to the sufficiency of the evidence. *See, e.g., United States v. Abrams,* 568 F.2d 411, 417 (5th Cir. 1978) (holding that when examining a jury's determination that the defendant "gave false testimony", "[t]he applicable standard of review is not whether we think the evidence sufficient but whether a reasonable jury could so conclude beyond a reasonable doubt."); *United States v. Bell,* 623 F.2d 1132, 1136 (5th Cir. 1980) ("the prevailing view is that the defendant's understanding of the question is a matter for the jury to decide"); *United States v. Gaudin,* 515 U.S. 506 (1995) (holding that materiality is an element of perjury and thus a question for the consideration of the jury).

beyond a reasonable doubt." *United States v. Holmes*, 406 F.3d 337, 351 (5th Cir. 2005).

First, Brown argues that the evidence presented is insufficient to support a reasonable juror's finding that his testimony was untruthful. We disagree. Along with other circumstantial evidence of Brown's knowledge of the details of the transaction, the Government presented the following:

1. Brown was approached in late December 1999 by Furst, who explained that Enron Treasurer Jeff McMahon "asked Merrill to purchase $7 [million] of equity in a special purpose vehicle that would allow Enron to book $10 [million] of earnings", and that the transaction "must close by 12/31/99". Furst further explained to Brown that "Enron is viewing this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months".

2. Brown was a part of a conference call on December 22, 1999 (the Trinkle call) in which Brown, Bayly, Furst and others, all Merrill Lynch employees, but excluding lawyers, discussed Enron's need to close the deal to achieve needed revenue goals. Further, it was noted that Enron told Merrill that it would help find a third party buyer and that, if a third party buyer was not secured by June 30, 2000, Enron would repurchase the barges from Merrill. At some point during the call, Bayly asked whether a written assurance of Enron's promise was available, and someone responded that a writing was not

possible because such an assurance would prevent Enron from receiving the accounting treatment it was seeking from the deal.

3. Three versions of the engagement letter were circulated among Brown and others, the final draft being executed by Brown on behalf of Merrill. The initial draft of the engagement letter included reference to Enron's buyback guarantee. On December 28, Boyle sent out a second draft of the letter with "strike-through" indicating the proposed removal of all references to the buyback guarantee. The final executed version of the engagement letter contained no reference to the buyback guarantee.

4. Finally, Brown's own e-mail in March 2001, more than a year prior to his grand jury testimony, plainly stated that "we had Fastow get on the phone with Bayly and lawyers and promise to pay us back *no matter what.*"[17] (Emphasis added.)

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[17] Brown, who was not a party to the "Fastow call," argues that the e-mail is inadmissible hearsay and that it is unreliable and fails to provide evidence that his grand jury testimony was false. However, the e-mail is admissible as non-hearsay under Federal Rule of Evidence 801(c) to reveal Brown's state of mind, i.e., his belief that the side deal had been entered into and confirmed by Fastow. Additionally, although Brown argues that any knowledge he had of the call was based on hearsay, the e-mail is admissible against him under Rule 801(d)(2)(A) as an admission by a party opponent. Despite Brown's contentions to the contrary, a reasonable jury could consider such an admission reliable and reject Brown's proffered explanation that the e-mail

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Based on this proof, a reasonable jury could have found that the evidence was sufficient to conclude that Brown's answers were untruthful. Brown further argues that his testimony was not actually false, as he never denied knowledge of some "understanding" or "comfort" between Enron and Merrill as to the buyback; rather, he merely denied knowledge of a "promise" of such a side-deal. This distinction and the spin placed on selective and hyper-technical word choice provides no refuge from the jury's verdict. "[I]f after conviction the defendant offers 'a contrived hypertechnical or lame interpretation of his answer' . . . the jury's decision must be left undisturbed." *Bell*, 623 F.2d at 1136 (quoting *United States v. Clifford*, 426 F. Supp. 696, 704 (E.D.N.Y. 1976) (citations omitted)). Based on this proof, a reasonable jury could have found that the evidence was sufficient to conclude that Brown knew that oral agreements had been made and that Brown's answers before the grand jury were untruthful.

Second, Brown argues that the grand jury questions were "fundamentally ambiguous". Our review of this testimony convinces us that the questions posed adequately conform with the principle that "[p]recise questioning is imperative as a predicate for the offense of perjury," *Bronston v. United States*, 409 U.S. 352, 358 (1973). There is no indication that

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was an exaggeration of "the strength of the promise [made by Fastow]. . . ."

Brown struggled to understand or actually misunderstood the meaning of the questions. Brown's answers were carefully responsive to the questions posed. Brown's caution in his word choice, using words like "comfort" and "best efforts," rather than "assurance," "promise," or "guarantee," indicates he was keenly aware of the thrust of the prosecutor's questions.

Finally, Brown's third argument challenging the materiality of his answers is two-fold: First, he contends that any knowing misrepresentations that he may have made were not material to the grand jury investigation; second, he argues that the refusal of the District Court to admit the entirety of his grand jury testimony was error, because consideration of that evidence would have prevented the jury from believing his testimony to be material. Materiality under § 1623 requires only that the defendant's statements "[had] a 'natural tendency to influence, or [were] capable of influencing, the decision of the decisionmaking body to which it is addressed.'" *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)); *see also Abrams*, 568 F.2d at 421 (same). The Government does not have to demonstrate that the grand jury was *actually* hindered in any way by the falsehood. *See Abrams*, 568 F.2d at 421 ("Actual impediment of the investigation is not required. . . . Grand jurors are capable of judging credibility and they are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer."). The central issue before the grand jury at the time of

Brown's testimony was whether there was an oral buyback guarantee between Enron and Merrill and if there was such an agreement, who was culpable. Any testimony by Brown relating to the existence of the agreement, or his knowledge or understanding about that agreement, was necessarily material to the inquiry of the grand jury.[18] Brown's argument to the contrary is meritless.

Brown's second argument as to materiality is that the District Court erroneously excluded his entire grand jury testimony. This evidentiary ruling is reviewed for an abuse of discretion. *United States v. Walker,* 410 F.3d 754, 757 (5th Cir. 2005) (citing *United States v. Phillips,* 219 F.3d 404, 409 (5th Cir. 2000)). Brown contends that it was impossible for the trial jury to determine if his statements were perjurious without seeing the context in which they were given. The District Court reviewed Brown's proffered testimony and declined to admit it, finding that "the questions . . . and answers" contained therein "are not genuinely in question," and concluding that

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[18] The materiality requirement of § 1623 has been satisfied in cases where the false testimony was "relevant to any subsidiary issue or [wa]s capable of supplying a link to the main issue under consideration." *United States v. Griffin,* 589 F.2d 200, 207 (5th Cir. 1979) (noting that "[t]he testimony need not be directed to the primary subject under investigation"). Consequently, it appears that even if Brown's falsehood was relevant only as to his participation in the buyback agreement (and was not, as Brown argues, material to the existence of the buyback itself) the materiality requirement of § 1623 is still satisfied.

the testimony was not relevant and would lead to jury confusion. We have reviewed the record, including the proffered testimony, and find no abuse of discretion by the District Court.

For the reasons given, we find no reason to upset the jury verdict and accordingly, affirm Brown's conviction for perjury before a grand jury.

B

Brown next argues that even if the perjury conviction must be sustained, there is no basis for the verdict on obstruction of justice. Obstruction of justice is defined in 18 U.S.C. § 1503(a) as "corruptly . . . endeavor[ing] to influence, obstruct, or impede . . . the due administration of justice". 18 U.S.C. § 1503(a) (1996). This clause "clearly forbids *all* corrupt endeavors to obstruct or impede the due administration of justice." *United States v. Williams,* 874 F.2d 968, 977 (5th Cir. 1989) (emphasis in the original). Brown contends, however, that where false testimony alone is the basis for the offense, "it still must be shown to have the effect of impeding justice." Brown essentially argues that perjury and obstruction are separable and distinct offenses; consequently, the mere fact that one perjures himself does not mean that he has obstructed justice.[19] Thus, the obstruction

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[19] We acknowledge this argument is well reasoned and persuasive. However, under the precedent of this circuit, as discussed *infra,* false testimony as to one's *knowledge* relating to

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conviction must be reversed because "[t]he government introduced no evidence . . . [to] establish that Brown's testimony had any effect (actual, natural, or probable) on the Grand Jury proceeding."

Brown's argument is reasoned and appealing. Nevertheless, our precedent makes clear that material false testimony regarding one's knowledge of the subject matter of a grand jury investigation has an effect beyond its falsity; it also impedes the investigation of the grand jury. In both *United States v. Griffin,* 589 F.2d 200 (5th Cir. 1979), and *Williams,* the defendants testified falsely to a grand jury by giving "evasive answer[s]" and "denials of knowledge" relating to the subject of the grand jury inquiry. In both cases, the defendants, like Brown, argued that their § 1503 convictions must be reversed as the Government had not presented independent evidence that these falsehoods actually impeded the grand jury. Writing for this Court, respectively, both Judges Wisdom and Garwood rejected those contentions, finding that "the denials of knowledge had the effect of closing off entirely the avenues of inquiry being pursued, namely, *what appellants knew about the subject under investigation.*" *Williams,* 874 F.2d at 981 (emphasis added); *see also Griffin,* 98 F.2d at 204.

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the subject of a grand jury inquiry does in fact establish obstruction; not because the perjury *ipso facto* establishes obstruction, but because the perjurious testimony has the effect of "closing off entirely the avenue[ ] of inquiry being pursued." *Williams,* 874 F.2d at 981.

As explicated by Judge Wisdom, "[b]y falsely denying knowledge of events and individuals when questioned about them, [the defendant] hindered the grand jury's attempts to gather evidence [of the alleged scheme] as effectively as if he refused to answer the question at all." *Griffin,* 589 F.2d at 204. Consequently, the "testimony had the effect of impeding justice."[20] *Id.*

Brown attempts to distinguish his case, arguing that he testified of his own free will, that he answered every question, and that he never directly denied knowledge of the Fastow conversation. Consequently, he cannot be found to have obstructed the grand jury. Brown's argument, however, presupposes that his "voluntary" and "complete" testimony was true – a presupposition rejected by the jury's conviction of perjury. Given our precedent, we see no principled reason that justifies different treatment of Brown's untruthful testimony and denials of knowledge; as much as the defendants in *Griffin* and *Williams,* Brown "closed off entirely the avenue being pursued," namely, his knowledge or understanding of what actually occurred. We are bound by the precedent of this Circuit, and under that precedent, no other proof of impediment is required to demonstrate obstruction

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[20] Because the testimony in *Griffin* and *Williams* did in fact impede the grand jury, both cases declined to determine whether perjury before a grand jury "*ipso facto* constitutes a violation of section 1503," *see Griffin,* 589 F.2d at 204; *Williams* 874 F.2d at 980.

under § 1503. *Williams,* 874 F.2d 968; *Griffin,* 98 F.2d 200.[21]

Given the evidence presented by the government that Brown's testimony was false, and the jury's apparent acceptance of that evidence, Brown's perjurious testimony had the effect of "closing off entirely the avenue[ ] of inquiry being pursued." *Williams,* 874 F.2d at 981. Consequently, Brown's testimony was corruptly attempting to influence the administration of justice in violation of § 1503. As such, we affirm Brown's conviction for obstruction of justice.

VI

We sum up as follows: The convictions of each of the Defendants for conspiracy and wire fraud are VACATED; the District Court's denial of Fuhs's motion for judgment of acquittal is REVERSED and his convictions are VACATED; and the conviction and sentences of Brown on charges of perjury and obstruction of justice are AFFIRMED.

REVERSED in part; VACATED in part; and AFFIRMED in part.

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[21] Brown repeatedly cites *In re Michael,* 326 U.S. 224 (1945), for the proposition that an obstruction conviction based on perjury alone cannot stand. However, *Griffin* squarely rejected that argument. 985 F.2d at 205-06. *See also Williams,* 874 F.2d at 979.

REAVLEY, concurring in part and dissenting in part:

I concur in the dismissal of charges against Fuhs because of the insufficiency of the evidence at the stage of the end of the government's case-in-chief. And I concur in affirming Brown's convictions for perjury and obstruction of justice. I would, however, affirm the judgment against Brown, Bayly and Furst for conspiracy and wire fraud.

The government's theory of wire fraud relating to the deprivation of honest services is warranted by 18 U.S.C. § 1346 because it applies to the behavior in this case. While the majority recognizes that the government provides a "very plausible, even strong case for a criminal deprivation of honest services," it goes on to hold that the scheme as alleged in the indictment falls outside the scope of honest services fraud, and unnecessarily sets up a new "demilitarized zone" for the honest services fraud theory. ("[W]here an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.").

Both our pre- and post-*McNally* case law supports the honest services fraud theory alleged in the indictment and proven at trial. To prove a violation of the honest services branch of the federal fraud

statutes, the government must prove that a defendant deprived his employer of services under state law. *United States v. Caldwell,* 302 F.3d 399, 409 (5th Cir. 2002); *United States v. Brumley,* 116 F.3d 728, 734 (5th Cir. 1997) (en banc) (the employee "must act or fail to act contrary to the requirements of his job under state law"). In *United States v. Ballard,* 663 F.2d 534, 353 (5th Cir. 1981), this court held

> that a breach of fiduciary duty of honesty or loyalty involving a violation of the duty to disclose could only result in criminal mail fraud where the information withheld from the employer was material and that, where the employer was in the private sector, information should be deemed material if the employee had reason to believe the information would lead a reasonable employer to change its business conduct.

See also United States v. Gray, 96 F.3d 769, 774-75 (5th Cir. 1996) (same); *United States v. Fagan,* 821 F.2d 1002, 1009 (5th Cir. 1987) (same). This court has held that "a breach of fiduciary duty can constitute illegal fraud . . . only when there is some detriment to the employer." *Ballard,* 663 F.2d at 540. The court went on to find that the detriment can be a deprivation of an employee's faithful and honest services if a violation of the employee's duty to disclose material information is involved. *Id.* Thus, this court has

focused its inquiry on the duty to disclose and materiality.[1]

The indictment alleges that "[a]s Enron employees, Fastow, Glisan, [and] Boyle . . . each owed a duty to Enron and its shareholders to provide the company with their honest services." Count One then alleges that the defendants conspired to devise a scheme or artifice to defraud Enron and its shareholders "of the intangible right of honest services of its employees" and that they used "materially false and fraudulent pretenses, representations, and promises" in the process. Counts Two and Three reiterate those allegations for the substantive wire fraud offenses.

The evidence at trial proved that Fastow, Glisan, Boyle, and McMahon, and other Enron personnel temporarily "parked" the barges with Merrill Lynch so that Enron could meet its earnings. The defendants never disputed that Fastow, Glisan, Boyle, and McMahon were senior Enron executives and managers that owed a fiduciary obligations under state law to Enron and its shareholders. These fiduciary

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[1] I note that the Second Circuit in *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003), a case involving a kickback scheme, followed the lead of this court and adopted the materiality test in lieu of the reasonably foreseeable harm test. The court found that private sector honest services cases fall into two general categories: bribery or kickbacks and self-dealing. *Id.* at 139. While certainly these type of cases fit comfortably into the plain meaning of § 1346, honest services fraud is not limited to those categories, and any implication otherwise is unjustified.

obligations included the duty of loyalty, fair dealing, and candor. The Enron executives and managers breached their fiduciary duties by "cooking" Enron's books and engaging in the fraudulent "sale" of the barges to Merrill Lynch, withholding this information from Enron and its shareholders, and causing Enron to pay nearly $1.5 million to Merrill Lynch and LJM2 to hold the barges, along with paying compensation bonuses to APACHI executives that depended on the completion of the barge transaction.

In sum, the government proved that the defendants' scheme involved withholding material information from Enron and its shareholders and caused a detriment to Enron and its shareholders. Given that our pre- and post-*McNally* case law supports the honest services fraud theory alleged in the indictment and proven at trial, this should end the matter.

To distinguish this case from previous cases, the majority relies on two important propositions: (1) that the barge transaction was intended to serve a corporate purpose/goal, ("This case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest."); and (2) that there could no honest services violation because certain Enron executives knew all of the specifics of the barge deal and sanctioned the transaction, ("Enron's corporate incentive policy coupled with senior executive support

for the deal (the deal was sanctioned by Fastow, Enron's Chief Financial Officer), which together created an understanding that Enron has corporate interest in, and was a willing beneficiary of, the scheme."). I object to both justifications for the conspiracy.

First, the barge transaction did not serve the purpose of Enron's shareholders, and it cost Enron nearly $1.5 million, plus compensation to APACHI executives, that it should not have had to pay. Most important, falsifying Enron's books does not serve a legitimate corporate purpose, even if it temporarily made Enron's finances appear more attractive to the investing public in the short term. Second, it is no defense that the defendants' co-conspirators included high-ranking executives at Enron. The fact that those co-conspirators were aware of defendants' conduct does not excuse defendants' actions. But most important, Enron *executives* are not Enron itself and, in any event, they owed a fiduciary duty to Enron *and* its shareholders.[2]

I conclude that the behavior of the defendants falls squarely within the meaning of a "scheme or artifice to deprive another of the intangible right to honest services," measuring it against our pre- and

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[2] For these two reasons, I find the majority's attempt to distinguish and limit *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), to be unpersuasive.

post-*McNally* case law. I therefore respectfully dissent.

DeMOSS, Circuit Judge, concurring in part and dissenting in part:

I join without reservation Judge Jolly's opinion with respect to the honest services theory of the Indictment and the issue of insufficiency of the evidence as to Fuhs. However, I write separately to explain two additional points with respect to the honest services charge and to dissent with respect to Brown's convictions for perjury and obstruction of justice.

I.

With respect to § 1346 and the honest services theory, I would reach the Defendants' constitutional challenge and also point out the multiple and troubling problems with the Government's theory of applying § 1346 to these facts, even though the majority opinion disposes of the Defendants' appeal.

In our *Brumley* dissent, Judge Jolly and I did our best to point out the ambiguities in the text of § 1346 that gave us grave reservations about the statute's application. While we did not there call into question the statute's constitutionality as applied, 116 F.3d at 736 (Jolly and DeMoss, JJ., dissenting), I have since then twice had occasion to address § 1346. *See United States v. Griffin,* 324 F.3d 330, 356 (5th Cir. 2003); *United States v. Evans,* 148 F.3d 477 (5th Cir. 1998).

The Defendants have raised here a constitutional challenge to § 1346, and in my view the panel should now address that issue. Years of review of the application of § 1346 to varied facts persuade me that the constitutionality of § 1346 may well be in serious doubt. A federal criminal statute must define the crime "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Section 1346's text is undeniably vague and ambiguous and is subject to wide variation in application by the lower courts. Rather than address the larger constitutional problem with this statute, which would provide clarity to Congress, prosecutors, and the lower courts, the circuit courts have instead only clouded the meaning of § 1346 by repeatedly resolving the ambiguities of the statute's text via judicially created definitions and limitations. Our Court and our sister circuits end up doing precisely what most would say we lack the constitutional power to do, that is, define what constitutes criminal conduct on an ex post facto and ad hoc basis. In this regard, I add my voice to the dissenters in *Rybicki.* 354 F.3d at 163-65 (Jacobs, J., dissenting). Congress should repair this statute that, in my opinion, fails to provide the requisite "minimal guidelines to govern law enforcement." *Id.* at 358.

Additionally, the application of § 1346 to the facts presented in this case is particularly problematic for several reasons, the combination of which poses an

even greater harm to future business relationships and transactions than would any one of the problems alone. The Government's extension of the already ambiguous reach of § 1346 by way of an indictment for conspiracy to commit honest services fraud is especially troublesome. While § 1346's text offers little guidance on the scope of the crime's application, *see Brumley,* 116 F.3d at 741-42, 746 (Jolly and DeMoss, JJ., dissenting), at a minimum the word "services" has been in the past the basis for the statute's pre-*McNally* application to the employer/employee relationship. *See id.* at 734 (Higginbotham, J., majority opinion). To the extent that pre-*McNally* case law required a relationship that generated a duty of honest services, such a relationship does not exist in this case between the Defendants, who are employees of Merrill, and Enron or its shareholders, who are the purported victims of the alleged fraud. The limitation of criminal activity to relationships giving rise to a duty of honest services is ignored when any person who negotiates with an employee of another corporation is potentially entangled by the combination of § 1346 with our very broad understanding of conspiracy.

I also believe that a serious problem arises with respect to the Government's theory of harm in this case. It is absolutely undisputed that Merrill paid $7 million to Enron as a result of the closing of the transaction contemplated by the Engagement Letter of December 29, 1999 that was the final written agreement of the two parties ("the Engagement

Letter"). Even granting the Government that Enron paid back $250,000 as the advisory fee to Merrill, Enron still had $6,750,000 more in its bank account as a result of the Engagement Letter than it had before. The Government's theory of harm would have us ignore the initial gains to Enron and focus solely upon some later loss only tangentially connected to the particular investment transaction that forms the basis of the Indictment.

The cumulative effect of a vague criminal statute, a broad conception of conspiracy, and an unprincipled theory of harm that connects the ultimate demise of Enron to a single transaction is a very real threat, of potentially dramatic proportion, to legitimate and lawful business relationships and the negotiations necessary to the creation of such relationships.

II.

I dissent from the portion of the majority opinion that affirms the convictions of Brown for perjury and obstruction of justice. I cannot agree with the majority that on this record, particularly the portions quoted in the majority opinion, a reasonable jury could conclude that Brown's allegedly perjurious statements were in fact false. Brown argues that his testimony was true because it represented his subjective understanding of the transaction contemplated by the Engagement Letter. I agree. The majority relies primarily upon four points of evidence to support its assertion of falsity: Furst's explanations to Brown

that Enron viewed the deal as a "bridge to permanent equity"; the discussions of the December 22 conference call; working drafts of the Engagement Letter transmitted between Merrill and Enron that were never signed; and Brown's own e-mail of March 2001. These four points, along with other circumstantial evidence, comprise two types of evidence: (1) business negotiations preceding a deal ultimately reduced to a written agreement and (2) an after-the-fact oversimplification and shorthand description of the barge partnership investment by Merrill employees during the discussion and evaluation of a subsequent and entirely unrelated deal. Neither of these types of evidence should be used to support an inference of the falsity of Brown's testimony.

The evidence regarding both working drafts of the Engagement Letter and discussions between employees of Enron and employees of Merrill leading up to the final written agreement are simply the heart and soul of business negotiations and should not indicate the character of the ultimate business transaction. Some negotiations may ultimately be reflected in the final written agreement, but some may not. Here, negotiations are no evidence of the actual nature of the deal because there was no legally enforceable take-out promise in the final written agreement; instead, the parties merely bargained for Enron's best efforts to continue to market Merrill's investment interest in the barge partnership to the mutual benefit of both companies.

Such an agreement does not undermine the nature of the transaction as set forth in the Engagement Letter that was ultimately agreed to and signed by both parties. Employees of Enron and Merrill may well have considered a buy-back agreement, promise, or guarantee during the negotiations leading up to the barge deal; the evidence would certainly permit a reasonable jury to so conclude. But the final written agreement excludes this term. Instead, the parties relied upon their established business relationship and discussions of best efforts and strong comfort that Enron would continue its efforts to find a third-party buyer for Merrill's interest in the barge partnership. The conversations preceding the deal are only negotiations, and the ultimate written agreement speaks for itself. Two material facts corroborate this reading: (1) Fastow himself averred to the Government that he, in fact, made only assurances of best efforts to Merrill, not promises or guarantees to take Merrill out of the deal; and (2) in conformance with the written agreement, Merrill actually paid $7 million to Enron, consistent with its purchase of an interest in the barge partnership investment, and therefore had absolutely no legally enforceable claim to be taken out of the deal. The Government mischaracterizes the transaction evidenced by the Engagement Letter when it labels the agreement a "sham" and asserts that Merrill was never "at risk" during the transaction. The Engagement Letter expressly states, "No waiver, amendment, or other modification of this Agreement shall be effective unless in writing and signed by the parties to be bound."

Likewise, the Engagement Letter also includes the following provision: "This Agreement incorporates the entire understanding of the parties with respect to this engagement of Merrill Lynch by Enron, and supercedes all previous agreements regarding such engagement, should they exist." In light of these provisions, Merrill's $7 million was absolutely at risk. Any oral assurances of a take-out offered to Merrill by any Enron employee would not have been legally binding on Enron.

In my view, both parties acted to maximize mutual benefits in a clear effort to solidify a business relationship. Both parties relied on the good faith of each other in laying a foundation for continued business relationships. Merrill could not have enforced Enron's assurance of its best efforts commitment to remarket the investment interest that Merrill had agreed to purchase; Merrill could only have refused to deal with Enron in the future if the Engagement Letter had resulted in an unsatisfactory business investment. Such negotiations should not be the fodder for criminal indictments. If there is any criminal wrong arising from the facts in this record, and I have serious doubts on that score, it would be in Enron's employees' reporting of the transaction described in the Engagement Letter, not in the manner in which Merrill's employees negotiated the deal.

Brown's March 2001 e-mail was not a statement under oath; rather, it was a statement made to another Merrill colleague fifteen months after the Engagement Letter transactions that discussed a

proposed loan transaction with a potential borrower, a large corporate entity entirely unrelated to Enron (referred to in the e-mail as "CAL"). The talking point in the e-mail was whether Merrill would be a secured or an unsecured lender in the proposed deal. The pertinent part of the e-mail reads,

> If it[']s as grim as It sounds, I would support an unsecured deal provided we had total verbal [a]ssurance from CAL ceo or Cfo, and [S]hulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well. What do you think?

The text of the e-mail reveals that Brown was attempting to use the success of the earlier deal with Enron to persuade a colleague that the deal with CAL would likewise be successful. In the email, Brown did not distinguish the two deals. But the Enron deal and the CAL deal discussed in the e-mail differ in at least one important respect: the Enron deal involved the sale of an equity interest in an Enron partnership to Merrill and the CAL deal involved a loan by Merrill to CAL for funds to be used in building an extension to CAL's facilities. At the time the e-mail was written, Brown may have remembered the Enron deal as some sort of loan by Merrill to Enron; however, the Engagement Letter and the evidence before the jury reveal no such transaction. No legally enforceable promise was ever made to take Merrill out of the

Enron deal. Accordingly, no reasonable jury could construe the e-mail as anything but an overly simplified, shorthand description of the barge investment made after the fact in an effort to secure a subsequent, entirely unrelated deal. Under this reading of the e-mail, Brown's testimony before the Grand Jury was not inconsistent with the text of the email because there simply was no promise or guarantee regarding a take-out in the Enron deal. The questions posed by the Grand Jury related only to an enforceable take-out, not to an oral "promise to pay us back no matter what," and Brown's answers to those questions therefore do not conflict with his statements in the e-mail.

Finally, the Government's own evidence supports a conclusion that the only comfort offered to Merrill was that Enron would use its best efforts to sell to a third party. A reasonable jury could not convict Brown of perjury where the Government speaks out of both sides of its mouth with respect to the allegedly perjurious testimony. The Government simultaneously proffers the identical words as both evidence of Brown's guilt of perjury when the words are spoken by Brown and as evidence of the nature of the Enron transaction not being a sale when offered by the Government's own witnesses.

I conclude, therefore, that no reasonable jury could conclude that Brown's testimony before the Grand Jury was false. Accordingly, I must conclude that no reasonable jury could convict Brown of perjury. *See* 18 U.S.C. § 1623. Moreover, the sole basis in

the Indictment for the charge against Brown of obstruction of justice, *see* 18 U.S.C. § 1503(a), was Brown's allegedly false statements to the Grand Jury. Accordingly, I would also conclude that no reasonable jury could find Brown guilty of obstruction of justice on this record.

For the foregoing reasons, I would reverse the conviction of Brown on the perjury and obstruction of justice counts.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20038

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAMES A BROWN; ROBERT S FURST;
DANIEL BAYLY;

Defendant-Appellants.

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Filed Jul. 27, 2009)

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc of James A. Brown as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court

be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc of James A. Brown as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

Judges Garwood, Higginbotham, Benavides, Clement, and Elrod did not participate in the consideration of the rehearing en banc.

Order on pet EB treat as pan reh-REHG6A

U.S. Constitution: Fifth Amendment

Fifth Amendment – Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

MAIL FRAUD
18 U.S.C. § 1341
Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or

thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (*42 U.S.C. 5122*)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

WIRE FRAUD
18 U.S.C. § 1343
Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the

purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

HONEST SERVICES
18 U.S.C. § 1346
Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CR. NO. H-03-363 (Werlein, J.)
DANIEL BAYLY JAMES BROWN ROBERT FURST,	)	
Defendants.	)	

UNITED STATES' MOTION TO STRIKE SURPLUSAGE FROM THE INDICTMENT

(Filed Apr. 4, 2007)

The United States of America, by and through the undersigned attorneys, respectfully moves the Court to strike Counts Six, Seven and Eight from the Third Superseding Indictment, as those Counts have been resolved and are therefore surplusage. The United States further moves the Court to strike the references to Defendants Sheila Kahanek and William Fuhs from the other Counts in the Third Superseding Indictment as surplusage. The United States further moves the Court to strike the statutory language regarding deprivation of honest services and the sentencing allegations as surplusage.

I. PROCEDURAL HISTORY

Six defendants were charged in an eight count Indictment returned by the Grand Jury on July 22, 2004. All six defendants were charged with one count of conspiracy to commit wire fraud and falsify books and records, in violation of 18 U.S.C. § 371, and two counts of wire fraud, in violation of 18 U.S.C. § 1343. In Counts Four and Five, Defendant James Brown was charged with perjury and obstruction of justice, in violation of 18 U.S.C. §§ 1623, 1503. In Counts Six and Seven, William Fuhs was charged with perjury and obstruction of justice. And in Count Eight, Dan Boyle was charged with false statements to the United States Senate.

The charges against Ms. Kahanek, Mr. Fuhs and Mr. Boyle have been fully and finally resolved. Ms. Kahanek was acquitted on all charges by the jury trial before this Court. Mr. Fuhs' convictions were reversed and rendered by the Fifth Circuit on direct appeal. Mr. Boyle was convicted on all charges, and did not appeal. Accordingly, all the allegations against these three individuals have been fully and finally resolved and will not be retried.

Pursuant to decisions issued by of [sic] the Fifth Circuit and the United States Supreme Court, the United States intends to narrow its proof at trial and no longer intends to prove up before the jury the allegations in the Third Superseding Indictment regarding deprivation fo [sic] honest services or the Sentencing Allegations.

II. ARGUMENT

The United States moves the Court to strike Counts Six, Seven and Eight from the Indictment. These Counts charge Mr. Fuhs and Mr. Boyle with criminal misconduct, and do not contain any reference or allegation against the Defendants whose charges remain pending. Further, the United States moves the Court to remove all specific references to Ms. Kahanek, and Mr. Fuhs in the Introduction, Count One, Count Two and Count Three of the Third Superseding Indictment. Finally, the United States moves this Court to strike as surplusage the allegations regarding the deprivation of the right to honest services based on the [sic] *United States v Brown,* 456 F.3d 509 (5th Cir. 2006) and the section entitled Sentencing Allegations based on *United States v. Booker,* 543 U.S. 220 (2005).

Specifically, the United States proposes the following language be struck from the following pages of the Third Superseding Indictment:

Pages 1-13:	All references to Ms. Kahanek and Mr. Fuhs
Page 2:	Paragraph 7
Page 3:	Paragraph 8
	In Paragraph 10, the language "William Fuhs was a Vice President reporting to Brown in Brown's finance group"
Page 6:	Paragraph 19

Page 7:	Paragraph 22
Pages 10-11:	Subparagraph 31(d)
Page 11:	Subparagraph 31(h)
Pages 16-17:	Counts Six, Seven and Eight
Pages 17-18:	Sentencing Allegations
All pages:	All statutory references to 18 U.S.C. § 1346 as well as the statutory language in Counts One, Two and Three "including to deprive them of the intangible right to honest services of its employees,"

all as illustrated in Attachment A.[1]

The Fifth Circuit and the D.C. Circuit have both held, citing Supreme Court precedent, that courts may delete specific factual allegations that the government does not intend to prove as well as theories of prosecution from an indictment so long as doing so narrows, as opposed to expands, the charges a defendant faces. By striking specific allegations or theories from the charging instrument, the defendant suffers no prejudice. In *United States v. Glassman,* the Fifth Circuit upheld a conviction after the district could had [sic] deleted an alternative bases [sic] of conviction from an indictment without requiring the

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[1] If the Court intends to submit the indictment to the jury following the presentation of evidence, the United States can submit a redacted indictment that omits the honest services language.

government to resubmit the indictment to a grand jury. 562 F.2d 954 (5th Cir. 1977). The Court reasoned:

> The Supreme Court in *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), held that in federal courts an indictment may not be amended except by resubmission to the grand jury unless the change is merely a matter of form. Subsequent cases out of this circuit have not interpreted this as restricting deletion of surplusage from the indictment. Therefore, we find this is not an amendment. The deletion eliminated one of the alternatives specified in the statute and added nothing to the indictment. The remaining allegation charged an offense under 18 U.S.C. §§ 1462 and 2.

Id. at 957 (*citing United States v. Prior,* 546 F.2d 1254 (5th Cir. 1977); *United States v. Musgrave,* 483 F.2d 327 (5th Cir. 1973), *cert. denied* 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973) and *Womack v. United States,* 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316 (1973); *Thomas v. United States,* 398 F.2d 531 (5th Cir. 1967); *Marsh v. United States,* 344 F.2d 317 (5th Cir. 1965); *Overstreet v. United States,* 321 F.2d 459 (5th Cir. 1963), *cert. denied* 376 U.S. 919, 84 S.Ct. 675, 11 L.Ed.2d 614 (1964)).

In *United States v. Pigrum,* the Fifth Circuit upheld the validity of a conviction after the district court amended an indictment to strike language where doing so "reduced the defendant's exposure to conviction." 922 F.2d 249, 254 (5th Cir. 1991).

Similarly, eliminating the honest services fraud allegations from the indictment reduces defendant's [sic] exposure to the extent that the United States will proceed at trial against Defendants solely on the ground that they deprived Enron and its shareholders and to obtain money and property by means or materially false pretenses, representations and promises.

In *United States v. Poindexter,* the United States moved to strike language from the first count of a two-count indictment (but not dismiss the entire count) that had the effect of narrowing its proof under that count. The defendant objected and argued that he was entitled to be tried under the broader indictment returned by the grand jury "and none other." 719 F.Supp. 6, 8 (D.C. Cir. 1989) [sic] The Court rejected this argument and reasoned:

> That argument conflicts head-on with the decision of the Supreme Court in *United States v. Miller,* 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). In that case, a unanimous Supreme Court upheld the validity of a conviction upon proof that was narrower than the indictment. In the view of the Sureme Court, this change in the proof did not deprive the defendant of his right to be tried on an indictment returned by a grand jury. On the same principle, the reduction of the language of an indictment does not deny to a defendant his grand jury rights, provided that (1) the indictment as so narrowed continues to state a complete criminal

> offense, and (2) the offense is contained in the indictment as originally returned.

Id. at 8-9 *(citing Salinger v. United States,* 272 U.S. 542, 548-49, 47 S.Ct. 173, 175, 71 L.Ed. 398 (1926); *United States v. Zauber,* 857 F.2d 137, 151 (3rd Cir.1988); *United States v. Diaz,* 690 F.2d 1352, 1356 (11th Cir.1982); *United States v. Milestone,* 626 F.2d 264, 268 (3rd Cir.1980); *United States v. Lyman,* 592 F.2d 496, 500 (9th Cir.1978); *Thomas v. United States,* 398 F.2d 531 (5th Cir.1967)). Similarly, the "reduction of the language" of the indictment proposed here does not deny the defendants their grand jury rights.

In relevant part, the federal wire-fraud statute subjects to punishment:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses * * * transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings * * * for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343.

Nor by deleting the surplusage would the Court limit the Indictment in such a way that the Indictment no longer charges an offense. After the surplusage is struck, the Indictment contains specific allegations in support of each of elements of conspiracy and wire

fraud. In this case, "the indictment follows the statutory language of [section 1343]", *United States v. Thomas,* 348 F.3d 78, 82 (5th Cir. 2003), to the letter. Thus, the "indictment as so narrowed continues to state a complete criminal offense and the offense is contained in the indictment as originally returned." *Poindexter,* 719 F.Supp. 6 at 8. Again, the Defendants suffer no prejudice from the deletion of the surplusage.

IV. CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court strike the language identified as surplusage from the Third Superseding Indictment.

April 2, 2007
Houston, TX

Respectfully submitted,
STEVEN A. TYRRELL
Acting United States Attorney

/s/ _____
ARNOLD A. SPENCER
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Bar Card No. 00791709
110 N. College, Suite 700
Tyler, Texas 75702
903-590-1400
903-590-1439 (facsimile)

CERTIFICATE OF CONFERENCE

I hereby certify that the United States has, in accordance with Criminal Local Rule 12.2, conferred with defense counsel of record about the foregoing Motion in person on March 20, 2007, at which time defense counsel stated that they did not agree to the relief sought in the foregoing motion.

/s/ _____
ARNOLD A. SPENCER

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 2007, I caused a true and correct copy of the foregoing filing to be served via the ECF system upon all counsel of record.

/s/ _____
ARNOLD A. SPENCER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	Cr. No. H-03-363
	§	(Werlein, J.)
v.	§	
	§	*Violations*: 18 U.S.C.
DANIEL BAYLY,	§	§§ 371 (Conspiracy);
DAN O. BOYLE,	§	1001(a)(2) (False State-
JAMES A. BROWN,	§	ments); 1343, (Wire
	§	Fraud); 1503 (Obstruc-
ROBERT S. FURST, and	§	tion of Justice); 1623
Defendants.	§	(Perjury)

THIRD SUPERSEDING INDICTMENT

(Filed April 5, 2007)

The Grand Jury charges:

I. Introduction

A. Enron

1. At all times relevant to this Indictment, Enron Corp. ("Enron") was an Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the purchase and sale of natural gas, construction and ownership of pipelines and power facilities, provision of telecommunication services, and trading in contracts to buy and sell various commodities. Before it filed for bankruptcy on December 2, 2001, Enron was the seventh largest corporation in the United States.

2. Enron was a publicly traded company whose shares were listed on the New York Stock Exchange. As a public company, Enron was required to comply with regulations of the United States Securities and Exchange Commission ("SEC"). Those regulations protect members of the investing public by, among other things, ensuring that a company's financial information is accurately recorded and disclosed to the public.

3. Under SEC regulations, Enron and its officers had a duty to make and keep books, records and accounts that fairly and accurately reflected Enron's business transactions and to file with the SEC reliable quarterly and annual reports.

4. Conspirator Andrew S. Fastow was Enron's Chief Financial Officer ("CFO") from March 1998 to October 24, 2001. As CFO, Fastow had oversight over many of Enron's financial activities. During the time that he served as Enron's CFO, Fastow also served as the general partner and otherwise was in control of certain special purpose entities with which Enron did business, including LJM 2 Co-Investment, L.P. and its affiliates ("LJM2").

5. Conspirator Ben F. Glisan. Jr., was Enron's Treasurer from the spring of 2000 until the fall of 2001. Glisan assisted in supervising Enron's structured finance, cash flow and debt management activities.

6. Defendant DAN O. BOYLE joined Enron in 1998 and held a variety of positions, including Vice

President in Global Finance. BOYLE was a lead employee assigned to effectuate the Nigerian barge transactions discussed below.

B. Merrill Lynch & Co., Inc.

9. Merrill Lynch & Co., Inc. ("Merrill Lynch") was a Delaware corporation with its headquarters in New York, New York. Merrill Lynch was a major financial institution, with offices in Houston and Dallas, Texas, among other places. Merrill Lynch engaged in business with various leading corporations, including Enron.

10. At all times relevant to Count One of this Indictment, defendant DANIEL BAYLY was the head of the Global Investment Banking division at Merrill Lynch; defendant JAMES A. BROWN was the head of Merrill Lynch's Strategic Asset Lease and Finance (formerly known as Global Structured Finance) group;

and defendant ROBERT S. FURST was the Enron relationship manager for Merrill Lynch in the investment banking division and as such

was responsible for generating business for Merrill Lynch from Enron. Defendants BAYLY, BROWN, and FURST were all Managing Directors of Merrill Lynch.

II. The Nigerian Barge Transactions

11. From in or about and between December 1999 through January 2001, as part of a scheme to manipulate Enron's reported earnings, Enron and Merrill Lynch executives engaged in a year-end 1999 deal that involved the "parking" of Enron assets with Merrill Lynch. The parking of the assets with Merrill Lynch enabled Enron executives to enhance fraudulently Enron's year-end 1999 financial position that Enron presented to the public and to pay Enron executives unwarranted bonuses. By facilitating the Enron executives' deception, Merrill Lynch executives solidified Merrill Lynch's status as a "friend of Enron" and thereby positioned Merrill Lynch and themselves to receive an increased slice of the lucrative deals that Enron dispensed to financial institutions. Defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, and conspirators Fastow and Glisan, and others, all knowingly participated in this illegal scheme.

12. In 1999, Enron unsuccessfully sought to sell an interest in electricity-generating power barges moored off the coast of Nigeria. When Enron failed to

sell the project by December 1999, Enron executives, including Fastow, defendant BOYLE
and others arranged for Merrill Lynch to serve as a temporary buyer so that Enron could record earnings and cash flow in 1999 and thus appear more profitable to the public than it in fact was. Merrill Lynch agreed to pay $28 million for the barges, with 75% of that amount fronted by Enron itself. Merrill Lynch's purchase of the Nigerian barges allowed Enron executives to record improperly $12 million in earnings and $28 million in funds flow in the fourth quarter of 1999. Those inflated numbers in turn enabled the business unit from which the barge deal emanated to meet its targeted financial goals for the year, which in turn led to increased unwarranted bonuses to executives in that business unit.

13. Merrill Lynch executives, including defendants DANIEL BAYLY, JAMES A. BROWN;
and ROBERT S. FURST, and others, agreed to purchase the Nigerian barges only because Merrill Lynch executives knew that the "purchase" was not real. Enron executives promised Merrill Lynch that it would receive a return of its investment plus an agreed-upon profit within six months. Specifically, Enron executives promised in an oral "handshake" side-deal that Merrill Lynch would receive a rate of return of approximately 22% and that Enron would sell the barges to a third party or repurchase the barges within six months. Because of these promises from Enron executives, Merrill Lynch's supposed equity investment was not truly "at risk"

and Enron should not have treated the transaction as a sale from which earnings and cash flow could be recorded in 1999.

14. In order to mask the full agreement from regulators, auditors, and others, Enron and Merrill Lynch executives entered into written agreements on December 29, 1999, that gave the outward appearance that Merrill Lynch was truly buying the Nigerian barges and accepting all the risks and rewards of an equity investment. Hidden from outside parties were the oral components of the agreement between the parties, which guaranteed Merrill Lynch a rate of return and set a deadline by which Merrill Lynch would no longer hold the barges for Enron.

15. On June 29, 2000, with no true third-party purchaser having been found to buy Merrill Lynch's interest as the six-month deadline loomed, Enron executives arranged for LJM2, which was operated and controlled by Fastow, to purchase Merrill Lynch's interest. Without any negotiation between Merrill Lynch and LJM2 as to the purchase price, Enron executives caused LJM2 to pay $7,525,000 to Merrill Lynch, which represented a $525,000 premium over Merrill Lynch's original investment to account for the agreed-upon approximate 22% rate of return promised by Enron. Enron executives also agreed to pay LJM2 a substantial but undisclosed fee for entering into the deal with Merrill Lynch. Enron executives subsequently arranged for a third party to purchase

LJM2's interest in the barges, again at a profit to LJM2.

III. The Defendants' Obstruction of The Investigations Into The Nigerian Barge Transactions

16. The Nigerian barge transactions have been the subject of investigation by various entities. To hide their criminal conduct, the defendants DANIEL BAYLY, JAMES A. BROWN, ROBERT S. FURST, and DAN O. BOYLE and others, obstructed those investigations.

A. The Enron Grand Jury Investigation

17. In March 2002, a special Grand Jury empaneled in the Southern District of Texas (the "Enron Grand Jury") commenced a criminal investigation of all matters relating to Enron's collapse involving potential violations of the federal criminal laws, including an examination of financial institutions' employees who may have conspired with and aided and abetted Enron's employees in criminal offenses. Among other matters, the Enron Grand Jury has examined the Nigerian barge transactions to determine whether Enron and Merrill Lynch entered into an oral side agreement in December 1999. As part of that investigation, the Enron Grand Jury has heard from dozens of witnesses and reviewed voluminous records from Enron, Merrill Lynch, and LJM2, among others.

18. As part of its investigation concerning the Nigerian barge transactions, on September 25, 2002, the Enron Grand Jury called as a witness defendant JAMES A. BROWN to testify. While under oath, defendant BROWN testified falsely as to a material matter by stating that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction.

B. The SEC Investigation

20. The SEC has conducted a civil investigation into the Nigerian barge transactions as part of its larger investigation into the collapse of Enron. It too sought to determine whether there was an oral side agreement between Enron and Merrill Lynch. As part of its investigation it interviewed and deposed numerous witnesses and reviewed voluminous documents concerning the barge transactions.

21. On July 10, 2002, the SEC called defendant DANIEL BAYLY as a witness to testify under oath in a deposition concerning the barge transactions. Defendant BAYLY testified falsely as to a material

matter by stating, among other things, that he did not know of any oral guarantee between Enron and Merrill Lynch relating to the barge transaction.

23. On November 20, 2002, the SEC called defendant JAMES A. BROWN as a witness to testify under oath in a deposition concerning the barge transactions. Defendant BROWN again testified falsely as to a material matter by stating, among other things, that he did not know of any oral agreement between Enron and Merrill Lynch relating to the barge transaction. In fact, Brown was aware of an oral agreement between Merrill Lynch and Enron regarding the barges. On March 2, 2001, Brown sent an email ("the BROWN E-mail") to colleagues concerning his suggestion that Merrill Lynch enter into an oral side agreement in a deal with a company unrelated to Enron (the "Company"). The BROWN E-mail stated in relevant part:

> I'm not convinced yet that we can't obligate [the Company] more than Frank indicated, but I've been on the road the last 3 days and

> haven't been able to determine that. If its [sic] as grim as it sounds, I would support an unsecured deal provided we had total verbal surrances [sic] from [the Company] ceo or Cfo, and schulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with [defendant Daniel] Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well.

C. The Congressional Investigation

24. In the summer of 2002, the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate ("the Congressional Committee") conducted an investigation and hearing concerning, among other things, the Nigerian barge transactions. As part of that investigation, which was conducted pursuant to the authority of the Congressional Committee consistent with applicable rules of that body, the staff of the Congressional Committee interviewed and deposed witnesses and reviewed hundreds of documents concerning the transactions.

25. On July 17, 2002, the staff of the Congressional Committee interviewed defendant ROBERT S. FURST concerning the barge transactions. Defendant FURST made false statements as to a material matter by stating, among other things, that he did not know of any oral promise or guarantee

between Enron and Merrill Lynch relating to the barge transaction.

26. On July 19, 2002, the staff of the Congressional Committee also interviewed defendant DAN O. BOYLE concerning the barge transactions. Defendant BOYLE made false statements as to a material matter by stating, among other things, that he did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the Barge transaction.

27. The staff of the Congressional Committee also sought to interview defendant JAMES A. BROWN concerning the Nigerian barge transactions. Defendant BROWN authorized the submission of information concerning the barge transaction to the Congressional Committee staff. On July 28, 2002, defendant BROWN caused his agents to make false statements as to a material matter by causing them to state, among other things, that BROWN did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the barge transaction.

28. On July 30, 2002, the staff of the Congressional Committee deposed defendant DANIEL BAYLY under oath concerning the barge transaction. Defendant BAYLY testified falsely as to a material matter by testifying, among other things, that he did not know of any oral commitment or guarantee between Enron and Merrill Lynch relating to the barge transaction.

COUNT ONE
(Conspiracy to Commit Wire Fraud
and Falsify Books and Records)

29. The allegations of paragraphs 1 through 28 are realleged as if fully set forth here.

30. In or about and between December 1999 and January 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, along with conspirators Andrew S. Fastow and Ben F. Glisan, Jr., and others conspired to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, all in violation of Title 18, United States Code, Sections 1343, 1346; and (b) knowingly and willfully falsify books, records and accounts of Enron in violation of Title 15, United States Code, Sections 78m(b)(2)(A) & (B), 78m(b)(5) and 78ff and Title 17, Code of Federal Regulations, Section 240.13b2-1.

OVERT ACTS

31. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST,

and their conspirators did commit and cause to be committed the following overt acts, among others:

a. In late December 1999, FURST caused a document that summarized the proposed Nigerian barge transaction between Enron and Merrill Lynch to be circulated within Merrill Lynch, including in Merrill Lynch's Houston, Texas office; the document stated that defendant BAYLY "will have a conference call with senior management of Enron confirming this commitment to guaranty the ML [Merrill Lynch] takeout within six months" and noted that the proposed return on the transaction would be "$250,000 plus 15% per annum or a flat 22.5% return per annum."

b. In late December 1999, FURST spoke to BROWN concerning the terms of the proposed Nigerian barge transaction between Enron and Merrill Lynch.

c. On or about December 22, 1999, FURST, BROWN and others at Merrill Lynch participated in a meeting to discuss the proposed Nigerian barge transaction.

e. On or about December 22, 1999, Merrill Lynch executives spoke with BAYLY concerning the proposed Nigerian barge transaction.

f. On or about December 23, 1999, BAYLY spoke on a conference call to Fastow in Houston, Texas, and Fastow promised BAYLY that Enron would take Merrill Lynch out of the deal within six months.

g. On or about December 29, 1999, in Houston, Texas and elsewhere, the defendants caused Enron and Merrill Lynch to finalize their written agreement concerning the Nigerian barge transaction, which did not set forth the oral agreements reached between the parties.

i. On or about June 14, 2000, when Enron had not yet found a third party to buy the barges from Merrill Lynch, FURST, BROWN and others caused a letter to Enron to be drafted demanding payment by Enron of the agreed-upon return on its investment in the barges by June 30, 2000.

j. On or about June 14, 2000, in Houston, Texas, Fastow and others arranged for LJM2 to buy Merrill Lynch's investment in the barges, fulfilling the promise by Enron executives to Merrill Lynch that it would be bought out within six months at a rate of return of approximately 22%.

k. On or about June 14, 2000, in Houston, Texas and elsewhere, BOYLE communicated that Enron had found a buyer for the barges at the "agreed upon" price. (Title 18, United States Code, Sections 371 and 3551 *et seq.*)

COUNTS TWO AND THREE
(Wire Fraud)

32. The allegations of paragraphs 1 through 28 are realleged as if fully set forth here.

33. On or about the dates set forth below, each such date constituting a separate count of this Indictment, within the Southern District of Texas and elsewhere, defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN,

ROBERT S. FURST, and having devised a scheme and artifice to defraud Enron and its shareholders,

and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to defraud, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, specifically those identified below:

Count	**Defendant(s)**	**Date**	**Wire Communication**
2.	DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, and	December 29, 1999	facsimile of Merrill Lynch Engagement letter from Enron International, Houston to Merrill Lynch, New York
3.	DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, and	June 28, 2000	email from wfuhs@exchange.ml.com (New York) to ace.roman@enron.com (Houston) forwarding wire instructions for $7,525,000

(Title 18, United States Code, Sections 1343, 2 and 3551 *et seq.*)

COUNT FOUR

(BROWN: Perjury Before The Enron Grand Jury)

34. The allegations in paragraphs 1 through 15, 17, and 18 are realleged as if fully set forth here.

35. On or about September 25, 2002, in the Southern District of Texas, defendant JAMES A. BROWN, while under oath and testifying in a proceeding before a Grand Jury of the United States, knowingly did make a false material declaration as set forth below.

36. At the time and place stated above, the Enron Grand Jury was conducting an investigation into potential federal criminal offenses relating to the Nigerian barge transactions. It was material to this investigation that the Enron Grand Jury determine all the terms of the agreements, whether written or oral, between Enron, Merrill Lynch, and LJM2.

37. At the time and place stated above, defendant BROWN, appearing as a witness and testifying under oath at a proceeding before the Enron Grand Jury, knowingly made the following declarations in response to questions with respect to matters material to the Grand Jury's investigation (the portions that have been underlined are false):

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A. *It's inconsistent with my understanding of what the transaction was.*

(Tr. at 80, lines 6-11.)

Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: *In – no, I don't – the short answer is no, I'm not aware of the promise.* I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, *and I did not think it was a promise though.*

Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: *No.*

(Tr. at 88, lines 13-23.)

(Title 18, United States Code, Sections 1623 and 3551 *et seq.*)

COUNT FIVE
(BROWN: Obstruction of the
Enron Grand Jury Investigation)

38. The allegations of paragraphs 1 through 15, 17, 18, 36 through 37 are realleged as if fully set forth here.

39. On or about September 25, 2002, in the Southern District of Texas, defendant JAMES A, BROWN did corruptly endeavor to influence, obstruct, and impede the due administration of justice in that BROWN did knowingly and willfully make false and misleading declarations before the Grand Jury with intent to obstruct and impede the Enron Grand Jury investigation.

40. At the time and place stated above, BROWN corruptly endeavored to influence, obstruct, and impede the due administration of justice by giving false and misleading testimony: the declarations which are underscored in Count Four.

(Title 18, United States Code, Sections 1503 and 3551 *et seq.*)

[Pages 16 And 17 Were
Deleted By The Government]

* * *

Dated: Houston, Texas
July 22, 2004

A TRUE BILL

/s/ Linda Clifton
FOREPERSON

JOSHUA R. HOCHBERG
Acting U.S. Attorney

ANDREW WEISSMANN
Director, ENRON TASK FORCE

By: /s/ Kathryn H. Ruemmler
Matthew Friedrich
John H. Hemann
Kathryn H. Ruemmler
Assistant United States Attorneys
ENRON TASK FORCE

Bayly Exhibit 17
(excerpt of Share Purchase Agreement
containing integration clause, 12/29/99)

EXECUTION COPY

Dated 29 December 1999

ENRON NIGERIA BARGE HOLDING LTD.
and
EBARGE, LLC

SHARE PURCHASE AGREEMENT

---

* * *

[8] shall impair or extinguish such right, power or remedy or operate as a waiver thereof.

8.2 Subject to Clause 14.4 hereof, the single or partial exercise of any right, power or remedy under this Agreement or provided by law shall not preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

8.3 Subject to Clause 14.4 hereof, the rights, powers and remedies provided in this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by law unless stated expressly.

8.4 Neither Party shall be liable to the other Party in respect of any claim under or in respect of this Agreement for any indirect or consequential loss including, without limitation, any loss of goodwill or opportunity or future profits.

9. Assignment

None of the rights or obligations of either of the Parties under this Agreement may be assigned or transferred to any person without the prior written consent of the other Party.

10. Entire Agreement

10.1 This Agreement and the schedules hereto contain the whole agreement between the Parties relating to the sale and purchase of the Shares, and supersede all previous agreements between the Parties relating to such sale and purchase.

10.2 Each Party acknowledges that in agreeing to enter into this Agreement it has not relied on any representation, warranty, covenant, undertaking, indemnity, collateral contract or other assurance made or given by any other Party or any other person, whether in writing or otherwise, at any time before signature of this Agreement, except as expressly set out herein, and in any other written instruments between the Parties.

10.3 Neither Party shall have any right of action against the other arising out of or in connection with any representation, warranty, undertaking, collateral contract or other assurance referred to in Clauses 10.1 or 10.2, except as expressly set out in this Agreement and except in the case of fraud.

11. Announcements

11.1 Subject to Clauses 11.2 and 11.3, no announcement concerning this Agreement, the sale of the Shares or any related or ancillary matter shall be made by either Party or its Affiliates without the prior written consent of the other Party.

* * *

[13] **IN WITNESS WHEREOF** the parties have duly executed this Agreement on the day and year first above written.

ENRON NIGERIA POWER HOLDING, LTD.

By: /s/ James A. Hughes E.E.

Name: James A. Hughes

Position: Director

EBARGE, LLC

By: /s/ Joseph S. Valenti

Name: Joseph S. Valenti

Position: Vice President & Treasurer

Trial Transcript Excerpts, Tr. 4520
(Re: lawfulness of re-marketing agreement)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	*	H-CR-03-363
VS.	*	Houston, Texas
	*	
DANIEL BAYLY, JAMES A.	*	October 12, 2004
BROWN, ROBERT S. FURST,	*	8:31 a.m.
DANIEL O. BOYLE,	*	
WILLIAM R. FUHS and	*	
SHEILA K. KAHANEK	*	

Volume 14

BEFORE THE HONORABLE EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:
Matthew Friedrich, Kathryn Ruemmler
and John Hemann
UNITED STATES DEPARTMENT OF JUSTICE
1400 NY Ave.
10th Floor
Washington, DC 20530

FOR DEFEENDANT DANIEL BAYLY:
Thomas A. Hagemann
GARDERE, WYNNE & SEWELL, L.L.P.
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Houston, Texas 77002-5007

And

Richard J. Schaeffer
DORNBUSG, MENSCH, MENDELSTAM
& SCHAEFFER
747 Third Avenue
New York, New York 10022
212.832.3160

* * *

[4520] second issue?

THE COURT: All right. Let's hear them both.

MR. FRIEDRICH: Your Honor, in the issue that a re-marketing –

THE COURT: This is Issue 2 now?

MR. FRIEDRICH: Yes, sir. I'm sorry. Let me just –

MR. SORKIN: I can tell you that right now, we won't address Issue 2.

THE COURT: All right.

MR. FRIEDRICH: Then let me just finish Issue 1. What he is saying in the second paragraph below that saying that "In my opinion, if ML – excuse me, "In my opinion, if Enron in words or substance told ML it would use best efforts to arrange for a subsequent sale," et cetera, et cetera, "the recognition of the gain would remain unchanged."

That's a fancy way of saying if it's just a re-marketing agreement that would not have caused a problem. We don't dispute that either. And, in fact, that's what the jury just heard from Cathy Zrike. If all it is was a re-marketing agreement, that would not have caused a problem. We don't dispute that. That's already in front of the jury.

We don't need an expert to come in and

* * *

Trial Transcript Excerpts, Tr. 6485
(Re: lawfulness of re-marketing agreement)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	*	H-CR-03-363
VS.	*	Houston, Texas
	*	
DANIEL BAYLY, JAMES A.	*	October 28, 2004
BROWN, ROBERT S. FURST,	*	8:30 a.m.
DANIEL O. BOYLE,	*	
WILLIAM R. FUHS and	*	
SHEILA K. KAHANEK	*	

Volume 22

BEFORE THE HONORABLE EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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and John Hemann
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212.759.3300

* * *

[6485] now." They're admitting that.

But the Merrill defendants are still denying that. They're still hanging on to the mask, and they're still saying there's nothing wrong with this deal, nothing wrong with it all, even after one of the Enron folks took the stand and admitted, "Yes, this was a parking deal." He's just disputing what he knew and when he knew it.

So let's deal with the Merrill defendants first and then come back to the Enron folks.

The Merrill defendants take the uniform approach, a fairly uniform approach, that all that was going on was just it was a re-marketing agreement. That's all it was. There's no buyback. It's just a marketing agreement.

But ask yourselves this simple question: If it's a re-marketing agreement, if that's all it is, why was it not put in writing?

Kathy Zrike, all the witnesses who testified, tell you there's nothing wrong with re-marketing. There's nothing wrong with that. They could have gotten a

sale and a gain treatment on this. If it was re-marketing agreement, there wouldn't have been a problem with that. If that's all it was, why wasn't it put in writing?

* * *

Trial Transcript Excerpts,
Tr. 6113-15, 6124, 6129-30
(Excerpts of jury instructions in *Brown I*)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	*	H-CR-03-363
VS.	*	Houston, Texas
	*	
DANIEL BAYLY, JAMES A.	*	October 27, 2004
BROWN, ROBERT S. FURST,	*	8:33 a.m.
DANIEL O. BOYLE,	*	
WILLIAM R. FUHS and	*	
SHEILA K. KAHANEK	*	

Volume 21

BEFORE THE HONORABLE EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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* * *

[6113] Count One: Conspiracy, 18 USC Section 371: Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States.

A conspiracy is an agreement with two – between two or more persons to join together to accomplish some unlawful purpose. It is a kind of partnership in crime to which – in which each member becomes the agent of every other member.

The defendants are charged in Count One of the Third Superseding indictment with conspiring to commit two federal offenses; first, wire fraud and, two, falsifying the books, records or accounts of Enron Corporation.

The defendants are charged with conspiring to commit wire fraud in two different ways. In other words, that first one has two subparts. The first of the wire fraud allegations is that the defendants conspired among themselves and with others to devise or participate [6114] in a scheme and, artifice to defraud Enron Corporation and its shareholders of the honest

services of its employees and, for purposes of executing this scheme and artifice to defraud, conspired to commit – correction – conspired to transmit and to cause to be transmitted information by wire communication in interstate commerce.

The second way in which the defendants are charged with conspiring to commit wire fraud is that the defendants conspired among themselves and with others to devise a scheme and artifice to defraud Enron Corporation and its shareholders of money or property and, again, for purposes of executing this scheme and artifice to defraud, conspired to transmit and to cause to be transmitted information by wire communication in interstate commerce.

As I mentioned above, the defendants are also charged in Count One of the Third Superseding Indictment with conspiring – what I've given you now is the wire fraud with the two subparts on wire fraud. And then, as I mentioned above, they are also charged in Count One with conspiring among themselves and with others to knowingly and willfully falsify the books, records or accounts of Enron Corporation in violation of federal statutes and regulations.

Thus, there are three ways in which the defendants are charged with conspiracy, wire fraud with two [6115] subparts and then falsifying the books and records of Enron. So those are the three ways it breaks down, if you follow.

Now, for you to find the defendant guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt. First: That two or more persons entered into an agreement or understanding (a) to defraud either (i) Enron Corporation of the honest services of its employees, or (ii) Enron Corporation or its shareholders of money or property and, for purposes of executing the foregoing fraud or frauds, agreed to transmit or cause to be transmitted information by wire communication in interstate commerce – that's the wire fraud – and/or to falsify the books, records or accounts of Enron Corporation, all as described in Count One of the Third Superseding Indictment.

That's the first element, that there was an agreement to do one or more of those three things.

Second: That at some time during the existence of the conspiracy, agreement or understanding, the defendant you are considering knew the purpose of the agreement and, with that knowledge, deliberately joined the conspiracy, agreement or understanding to further its purpose which purpose was unlawful.

And, third: That one of the conspirators

* * *

[6124] Conspirator's Liability for Substantive Count:

A conspirator is responsible for offenses committed by other conspirators if the conspirator was a member of the conspiracy when the offense was

committed and if the offense was committed in furtherance of, or as a foreseeable consequence of the conspiracy.

Therefore, if you have first found a defendant guilty of the conspiracy charged in Count One and if you find beyond a reasonable doubt that during the time that that defendant was a member of the conspiracy, another or other conspirators committed the offense – the offenses in Counts Two and Three – those are the substantive wire fraud counts that were coming to – in furtherance of or as a foreseeable consequence of that conspiracy, then you may find the defendant guilty of Counts Two and Three, even though the defendant may not have participated in any of the acts which constitute the offenses described in Counts Two and/or Three.

That is – that's the instruction with respect to a conspirator's liability for these substantive counts that I come to.

Now, Counts Two and Three – this is where I gave you a forward look, saying I was going to give you the explanation in greater detail on what the law is with

* * *

[6129] Now, Money or Property. I come to that part, the second subpart of wire fraud.

The second of the two alleged wire fraud schemes is to defraud Enron Corporation and its shareholders of money or property. Money requires no definition.

Property means not only what we customarily consider property, such as tangible items of value, but, also, certain intangible rights, such as the right that [6130] certain persons have to some kinds of information. Thus shareholders of a corporation have a property right to the full and accurate reporting of the corporation's material economic information so that the shareholders can monitor and police the behavior of the corporation and its officers and directors in order to protect the value of the shareholders' investment.

This information includes: (1) information available to shareholders as a result of access to corporate books and records that is required by state law; (2) information that, if withheld or inaccurately reported, would cause publicly available information about the corporation to be materially misleading; and (3) information that would materially aid shareholders in enforcing management's fiduciary duty under state law.

Not only do shareholders have a property right to certain corporate information, but so does the corporation itself. The corporation has the right to certain information so that the corporation can monitor its own actions in order to protect its assets and ensure that its actions conform to law.

* * *

Hearing Transcript Excerpts, 11/16/07.
(Dkt. 1010)
(Prosecutor's comments regarding redacted indictment)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)
VS.	) NO. H-CR-03-363
	) November 16, 2007
DANIEL BAYLY, JAMES A. BROWN and ROBERT S. FURST	)

MOTIONS HEARING
BEFORE THE HONORABLE EWING WERLEIN, JR.

For the Government: Mr. Arnold A. Spencer, AUSA
U. S. Attorney's Office
110 N. College, Suite 700
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For Defendant Bayly: Mr. Thomas A. Hagemann
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Mr. Lawrence S. Robbins
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Orseck, Untereiner &
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For Defendant Brown:	Ms. Sidney Powell Sidney Powell, PC 1920 Abrams Parkway, Suite 369 Dallas, Texas 75214
	Mr. Dan Cogdell Cogdell Law Firm 402 Main Street, Second Floor Houston, Texas 77002
For Defendant Furst:	Mr. Paul E. Coggins Ms. Madeleine B. Johnson Fish & Richardson, PC 1717 Main Street, Suite 5000 Dallas, Texas 75201
Court Reporter:	Bruce Slavin, RPR, CM

* * *

[37] MR. SPENCER: Thank you, Your Honor. I anticipate giving back a substantial part of my hour.

I think that most of the arguments that I have made in my brief are the same arguments I make now. I don't think that I would do a better job extemporaneously expounding on them; so, I will rely on the briefs for the nuts and bolts of the argument.

I guess the theme that I'd like to present to the Court and the position that the Government takes, notwithstanding the "honest services" part of the case that was originally alleged if the indictment, there was a very simple, straightforward, traditional mail fraud/wire fraud alleged in the indictment. That was

very simply that a number of different people came together and conspired to engage in a scheme to defraud a victim of money and property. That is not cutting any new teeth on the mail and [38] wire fraud statutes.

THE COURT: Well, what's the money that is the object of this –

MR. SPENCER: Well, there are several references to money in the indictment, Your Honor.

THE COURT: Let's take a look at those.

MR. SPENCER: One area that I just think is crystal clear is this 250-thousand-dollar advisory fee.

THE COURT: What page?

MR. SPENCER: I believe there are several references in the indictment. One of them is the specific – Well, here it is on Page 10 of the indictment, paragraph 31, subparagraph A. The reference in the last clause of subparagraph A, quotation, "$250,000 plus 15 percent per annum or a flat 22 and a half percent rate of return per annum". And then the same money is referenced in the facsimile letter, the engagement letter, that is the substance of Count 2 of the indictment.

This is $250,000 that is called an "advisory fee" by both sides. As alleged in the indictment and I think as undisputed, there was no advice provided by Merrill Lynch to Enron in the traditional investment

banking role. This was an upfront guaranteed payment to induce Merrill Lynch to enter into this transaction, and that in and of itself is a deprivation of money from Enron and from Enron [39] shareholders. That's $250,000 that they said this is an advisory fee and that wasn't an advisory fee. Even if it's a clean transaction, even if there is no other improper – I mean, I'm not conceding that there weren't a number of other improper aspects to the deal – that is a scheme to defraud Enron and Enron shareholders of $250,000. You have the 15 percent per annum, the $500,000-plus that gets calculated, which, again, is referred to in the same Paragraph 31(a) and then is the substance of the wire transmission that's referenced in Count 3 as a wire fraud. That, too, is money that I believe, under our argument, is fairly alleged in the indictment to be money that was defrauded from Enron and from its shareholders.

I understand the Defendants contests that point. They think they earned that money because their investment was at risk. That's not the allegation in the indictment and that is what we are here to discuss today, is the allegations in the indictment. We'll let the jury decide whether or not Merrill Lynch was at risk or not. But clearly the indictment states, alleges, that Merrill Lynch and Enron employees – I should be saying Merrill Lynch or corporately Enron – the individuals from both of those companies conspired with one another to defraud Enron and its shareholders of this money.

There are other references to money in [40] addition to this. There are references to bonuses that were paid to these employees. There are non-monetary but valuable items that were negotiated for and that were expected referred to in the indictment, specifically, at the bottom of Page 3 and the top of Page 4, "Merrill Lynch's executives solidified Merrill Lynch's status as a 'friend of Enron' and thereby positioned Merrill Lynch themselves" –

THE COURT: Well, is that money or property?

MR. SPENCER: I think that's something of value, Your Honor, absolutely. That is –

THE COURT: Well, does the interpretation of the wire fraud statute extend to being a friend of someone?

MR. SPENCER: To the extent that you're on a financial relationship, to the extent there is something valuable about that friendship. I mean this isn't they're going to socialize together. This is they are going to be better business partners, that Merrill Lynch is going to receive more business. So, this is a financial –

THE COURT: Is it money or is it property?

MR. SPENCER: I think it could be both.

THE COURT: Well, is there any authority for that?

MR. SPENCER: I am not prepared to present any right now, Your Honor, but I think that allegation is certainly in the indictment. I think it stands along with the other specific money allegations in the indictment.

[41] I'm not sure, Your Honor, and I don't concede that the Government is required to list all of the detailed aspects of the money or property –

THE COURT: Well, what property is described in here?

MR. SPENCER: Well, of course, we have argued that the material economic information is deprived – they have deprived the shareholders – these individuals deprived the shareholders of material economic information.

THE COURT: Where in the indictment is that alleged?

MR. SPENCER: Well, again, I am not sure it is specifically alleged in the indictment.

THE COURT: That's what we're talking about, is the sufficiency of the indictment.

MR. SPENCER: I understand that's the Court's inquiry, but the indictment itself specifically alleges, repeatedly, money and property that was deprived –

THE COURT: Well, that's tracking the statute, but where is the allegation of the content of the property?

MR. SPENCER: I'm looking specifically for the language which. . . . In Paragraph 12 there are references to inflated numbers. There are specific references to how Enron booked this transaction. And I think that it is clear from the indictment that these individuals are being charged [42] with creating those inflated numbers, with having those inflated numbers entered into the books and records.

THE COURT: Well, that's books and records, but we're focusing right now on property.

MR. SPENCER: The property or material economic information is related to the books and records. If you put out false books and records you also put out false – or you deprive somebody of receiving material economic information.

* * *

Trial Transcript Excerpts, Tr. 390
(Re: comments by prosecutors)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	* H-CR-03-363
VS.	* Houston, Texas
	*
DANIEL BAYLY, JAMES A.	* September 21, 2004
BROWN, ROBERT S. FURST,	* 8:34 a.m.
DANIEL O. BOYLE,	*
WILLIAM R. FUHS and	*
SHEILA K. KAHANEK	*

Volume 2

BEFORE THE HONORABLE EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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And

Richard J. Schaeffer
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MENDELSTAM & SCHAEFFER
747 Third Avenue
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212.832.3160

* * *

[390] MR. HEMANN: Your Honor, this is a case – or Your Honor – ladies and gentlemen, this is a case about a company called Enron, a company that claimed to make money on a transaction that it did not really make. And it is about Enron's Wall Street investment bankers that helped them do it.

Over the course of this trial, we will introduce evidence to you that will prove that these six defendants that you see sitting in the courtroom –

MR. COGDELL: Objection. Argumentative.

THE COURT: Overruled.

MR. HEMANN: We will introduce evidence that will prove to you that the six defendants sitting in this courtroom – Sheila Kahanek and Dan Boyle from Enron Corporation; Daniel Bayly, Jim Brown, Robert Furst and William Fuhs from Merrill Lynch – engaged and arranged a sale of an interest in three power barges that were floating off the African coast of Nigeria that was not really a sale, a sale that took place in the waning days, the last minutes, of December, 1999, that was done for one purpose and

one purpose only: To generate earnings for Enron Corporation.

* * *

Trial Transcript Excerpts, Tr. 6141-42
(Re: comments by prosecutors)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	* H-CR-03-363
VS.	* Houston, Texas
	*
DANIEL BAYLY, JAMES A.	* October 27, 2004
BROWN, ROBERT S. FURST,	* 8:33 a.m.
DANIEL O. BOYLE,	*
WILLIAM R. FUHS and	*
SHEILA K. KAHANEK	*

Volume 21

BEFORE THE HONORABLE EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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* * *

[6141] Ladies and gentlemen, over the last six weeks, you have had a firsthand look into how one of the most powerful investment banks in the world helped Enron Corporation cook its books. You have seen firsthand how Enron executives were deceiving investors. You have seen firsthand how these Wall Street bankers were all too happy [6142] to facilitate that deception. And you have seen that the Enron – excuse me – you have seen that these Merrill Lynch bankers aided and abetted Enron's deception for one simple reason. There was money in it, a lot of money.

* * *

Trial Transcript Excerpts, Tr. 6557
(Re: comments by prosecutors)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	* H-CR-03-363
VS.	* Houston, Texas
	*
DANIEL BAYLY, JAMES A.	* October 28, 2004
BROWN, ROBERT S. FURST,	* 8:30 a.m.
DANIEL O. BOYLE,	*
WILLIAM R. FUHS and	*
SHEILA K. KAHANEK	*

Volume 22

BEFORE THE HONORABLE EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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* * *

[6557] [AUSA Friedrich] This is a case about the integrity of our public markets. Publicly traded companies mean that the public own that stock.

Members of the public, moms, dads, pension funds, people of all races, all creeds, all beliefs, people just like you. They didn't have a right to much. They didn't have a guarantee like these guys had. They were equity investors. They could go up. They could go down.

They weren't entitled to much, but they were entitled not to be lied to. They were entitled not to be cheated. And don't forget that as you deliberate. Because the evidence supports it and because you believe it's right, find these defendants guilty on all counts of this indictment.

And thank you for your time.

* * *

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No. 09-496

Supreme Court, U.S.
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In The Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Brown respectfully petitions for rehearing of this Court's November 30, 2009, order denying certiorari. Petitions for rehearing are appropriate where there are "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented." Sup. Ct. R. 44.2. Both grounds apply here. For the reasons stated below, Brown requests that this Court:

(i) require that the Solicitor General file a response to Brown's petition; and,

(ii) either grant Brown's petition or hold it for consideration after this Court issues decisions in *Black*, *Weyhrauch* and *Skilling*.

INTRODUCTION

Brown's petition raises a claim of double jeopardy for consecutive wire fraud prosecutions depending solely on purported "intangible rights." Petitioner has already been acquitted of wire fraud under 18 U.S.C. §§ 1343 and 1346, and the government now seeks to retry him on the same facts and scheme, using 18 U.S.C. § 1343 alone – with the only difference in the two indictments being the deletions of the phrase "honest services" and of the citations to § 1346. The Fifth Circuit authorized the government to proceed with this second prosecution, but the government's position and the Fifth Circuit's interpretation of the

applicable law are squarely contradicted by the government's recent admissions to this Court at oral argument in cases involving these same provisions. *Black v. United States,* No. 08-876; *Weyhrauch v. United States,* No. 08-1196. *See also Skilling v. United States*, No. 08-1394.

The Government hid this inconsistency by the device of filing a waiver of response to Brown's petition for certiorari. As explained more fully below, this was not done by the Office of the Solicitor General, but by the Criminal Division pursuant to a delegated authority that allows waivers to be filed in criminal cases by the prosecutors, rather than by the Office of the Solicitor General. As a result, in this case, no one in that Office reviewed the petition or examined the appropriateness of a waiver. Whatever the propriety of such delegation in general, it was inappropriate here because of the close relationship of the issues in *Brown* to those in *Black*, *Weyhrauch*, and especially *Skilling* (where defendant's convictions rest in part on the exact same transaction at issue here). Accordingly, rehearing should be granted to direct the United States to file a response and explain its contradictory positions in *Black* and *Weyhrauch* and to avoid inconsistency with *Skilling*.

REASONS FOR GRANTING REHEARING

In his original petition, Brown, a Merrill Lynch employee, argued that the government's attempt to

try him again for failing to disclose information to Enron and its shareholders – based on their purported "intangible right" to "certain information" – after he had been acquitted of honest services fraud, violated the constitutional principles of double jeopardy and set a dangerous precedent. It raises the specter of a government end-run around any court-imposed limitation on – or outright rejection of – "honest services" prosecutions. The government conceded it cannot retry Brown under § 1346. The Fifth Circuit found Brown's conduct was not criminal under § 1346. Yet the identical remaining wire fraud charges (conspiracy and substantive) in this case depend solely on an instruction to the jury that Brown violated someone's amorphous intangible rights – now under § 1343 alone. The government's willingness to argue one thing to this Court but pursue a very different strategy before the Fifth Circuit, against Brown and others, require this Court's intervention. At a minimum, this Court should require the Solicitor General to respond to Brown's petition and to explain the government's inconsistent positions on intangible rights.

I. REHEARING SHOULD BE GRANTED TO REQUIRE THE SOLICITOR GENERAL TO REVIEW AND RESPOND TO BROWN'S PETITION AND EXPLAIN THE GOVERNMENT'S CONFLICTING POSITIONS.

Brown's 38-page petition was filed on Friday, October 23, 2009, and by Tuesday, November 2, 2009,

the government had filed a waiver in the name of the Solicitor General. Given the complexity of the double jeopardy issue and its relationship to *Black*, *Weyhrauch,* and *Skilling*, not to mention the heavy workload of the Department of Justice generally, and of the Office of Solicitor General in particular, it would have been impossible for the Criminal Division to have reviewed the petition and written a recommendation to the Solicitor General's Office, and for that Office to have reviewed the petition and recommendation and determined to file a waiver, all within 11 days, including two weekends, while they were also preparing for two oral arguments before this Court and presumably handling other matters.

Because a waiver was filed, there was no opportunity for petitioner to respond further, including to argue that the case should be held for *Black*, *Weyhrauch,* and *Skilling*, although all three cases were featured in the petition. This Court denied the petition on November 30, 2009. A week later, this Court heard oral arguments in *Black v. United States,* No. 08-876, and *Weyhrauch v. United States,* No. 08-1196, and repeatedly referred to the third case, *Skilling v. United States*, No. 08-1394, which recently has been advanced to oral argument on March 1, 2010.[1] Counsel of record in this case, Sidney Powell,

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[1] Skilling's conviction rests, in part, on the same transaction for which Brown faces a second trial for purported failure to disclose information to which "certain persons" had an "intangible right," despite the fact that Brown had no duty to disclose,

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attended the oral arguments in *Black* and *Weyhrauch*, where the Deputy Solicitor General made concessions regarding §§ 1343 and 1346 that supported Brown's double jeopardy claim in this case. *See* note 3, *infra*. Later that day, Powell discussed these developments with co-counsel on the rehearing petition, Alan B. Morrison, who informed Powell that he had another criminal case earlier this term, in which a waiver was filed in the name of the Solicitor General. At that time, a senior attorney in that Office advised Mr. Morrison that the Solicitor General formally delegated authority to the Criminal Division to file waivers; and, that when the Division exercised that authority, no one in the Solicitor General's Office saw the petition – let alone reviewed the propriety of filing a waiver in light of the position of the United States in other cases (*Black*, *Weyhrauch*, and *Skilling* in this instance).[2] Powell subsequently confirmed by telephone that the Deputy Solicitor General was not familiar with Brown's petition, despite the fact that

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and neither paid, sought or received any bribes, kickbacks or personal gain. Each of the trilogy of intangible rights cases pending before this Court implicates the first, inherent issue in *Brown* – the scope of the government's authority, if any, to prosecute "intangible rights" under 18 U.S.C. §§ 1341 or 1343, and 1346.

[2] It is most likely, as has become too common a practice, that someone in the Criminal Division of the Department, which has a long-standing vested interest in the many problematic Enron-related prosecutions, filed the waiver in an attempt to influence this Court to deny certiorari.

Brown's question presented is intertwined with the pending trilogy of honest services cases.

Undoubtedly, there are cases in which the United States may appropriately file a waiver where the decision is based on legitimate factors, such as the insignificance of the case or the absence of any relationship between that case and others in which similar issues are pending before this or other courts. But, this is not such a case. As the petition explains, the Fifth Circuit reversed petitioner's original convictions because Brown's conduct did not constitute an intangible rights or honest services fraud (dependent on §§ 1343 and 1346). Later, a different panel wrote an opinion explaining why the identical indictment, merely redacted of its "honest services" language, could support a re-trial under § 1343 alone, based on the identical facts. Filing a waiver enabled the United States to avoid coming to grips with the contradictions between its assertions in this case and the statements it made to this Court in *Black* and *Weyhrauch*, including references to *Skilling*.

The government should not be allowed to hide its contradictory positions by use of a form waiver. Given the grants of review in the three honest services cases and their close connection to this case, petitioner could not reasonably have anticipated that the United States would file a waiver in this case. Nor would it have been reasonable to include an anticipatory response in the petition: that is the purpose of a reply brief. Indeed, even a suggestion to hold this case for *Black*, *Weyhrauch*, and *Skilling* would have

been premature and unwarranted until the United States filed a response. For these reasons, filing a waiver in this case was improper, and this Court should direct the United States to file a response to Brown's petition.

II. THE RECENT CONCESSIONS BY THE GOVERNMENT UNDERSCORE WHY BROWN IS ENTITLED TO A REVERSAL AND PROTECTION FROM THE IRREPARABLE HARM OF A SECOND TRIAL FOR WIRE FRAUD.

At oral arguments before this Court, the Solicitor General conceded two points that entitle Brown to a reversal of the Fifth Circuit's decision in *Brown II*:

(i) "Intangible rights" may only be vindicated through reference to the honest services provision of the wire fraud statute.[3]

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[3] *Black* Oral Arg. Tr. 29 ("this Court held in *McNally* that the mail fraud statute [and by extension the wire fraud statute] did not protect intangible rights"); 46 ("this Court held [in *McNally*] that the mail fraud statute [and by extension the wire fraud statute] did not protect the deprivation of intangible rights"); 48 ("Congress intended to basically say to this Court [after *McNally*], you have determined that intangible rights are not protected under the mail fraud statute. . . . Congress desired to correct the statute [via § 1346] by protecting frauds that involve intangible rights."); *Weyhrauch* Oral Arg. Tr. 28 ("purpose of the statute [§ 1346] was to restore at least some part of the pre-*McNally* doctrine of intangible rights."); 41 ("the phrase

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(ii) "[N]on-disclosure of material information," standing alone, is "not enough" to constitute a valid charge of wire fraud under the honest services statute. *Weyhrauch* Oral Arg. Tr. 31-32; *see also id.* at 29 ("We are not here to argue that there is a free-standing federal duty of disclosure that applies in all cases . . . ").[4]

These and other admissions made at oral argument squarely contradict the government's position that it is entitled to prosecute Brown a second time, using § 1343 alone, for "property" defined as "the intangible right that certain persons have to some kinds of information." The Solicitor General conceded that the wire fraud statute alone, without reference to honest services as defined in § 1346, cannot be used to vindicate "intangible rights" or prosecute a mere "non-disclosure of material information." Yet, this is exactly what the government will do in a second prosecution of Brown unless this Court intervenes and reverses the dangerous precedent of the Fifth Circuit that licenses the government to prosecute defendants again on the same indictments

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'intangible rights' is at the center of the *McNally* majority opinion."); 46 (*McNally* held that "the mail fraud [and by extension wire fraud] statute did not protect intangible rights.").

[4] Brown, a Merrill employee, had no duty to Enron or its shareholders, as the Fifth Circuit held with respect to this transaction in *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393 (5th Cir. 2007).

and reach "intangible rights" through § 1341 or § 1343 alone.

As noted in the original petition for certiorari, this case provides the Court with a vehicle for clarifying what, if any, wire fraud offense, premised on the exact same facts, scheme and allegations, may be re-tried after an honest services or intangible rights conviction is held invalid. If the Fifth Circuit's decision in *Brown* is left standing, the government has precedent adding further confusion to this already troubled area of the law and opening the door to its circumvention of any decision of this Court declaring § 1346 unconstitutional or limiting its scope.[5]

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[5] Moreover, the Fifth Circuit has authorized the government to prosecute Brown again for what four other Circuits would necessarily hold is a clear double jeopardy violation. In *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000), this Court found that the mail fraud statute creates only one offense. Further, the Fourth, Seventh, Eighth and Tenth Circuits have held that Section 1346 does not create an offense separate from § 1343, and for which Brown could be prosecuted a second time. *See United States v. Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001); *United States v. Orsburn*, 525 F.3d 543, 546 (7th Cir. 2008); *United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000); *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003). The courts below did not even require the government to demonstrate that the two indictments charge Brown with legally separate crimes. *See also United States v. Rigas*, 584 F.3d 594, 609, 614 (3d Cir. 2009) (accepting double jeopardy argument and employing the appropriate burden-shifting standard for double jeopardy claims). Honest services and wire fraud are not

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The issues presented in this case are significant. The district court explicitly held they warranted review, and Brown's petition raises questions inextricably intertwined with those that will necessarily be decided in or result from the Court's pending trilogy of honest services cases. The compelling concessions by the Solicitor General directly contradict the government's position in *Brown* – rendering re-prosecution a travesty and introducing the possibility of a deliberate strategy by the government to evade this Court's rejection of the unconstitutionally-vague "intangible right of honest services" and relegation of § 1346 to the *McNally* scrap-pile.

The conflict between Brown's *second* prosecution for intangible rights under § 1343 and the government's statements to this Court on December 8, indicate, at best, that the government has not thought through the implications of its positions in *Brown* or the pending trilogy. At worst, the government is willing to wield the immense power of the sovereign to re-prosecute Enron-related defendants – even at the expense of the Fifth Amendment right against double jeopardy, its duties to this Court and its obligation to seek justice for all. *Berger v. United States*, 295 U.S. 78, 88 (1935).

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separate crimes under *United States v. Dixon*, 509 U.S. 688, 696-97 (1993).

CONCLUSION

For these reasons, and for the reasons stated in the petition for writ of certiorari, this Court should grant rehearing of the order of denial, vacate that order, require a response from the Solicitor General, and either grant the petition for writ of certiorari or hold it for further consideration in light of the pending trilogy of intangible rights cases.

Dated: December 23, 2009

Respectfully submitted,

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CERTIFICATION OF COUNSEL

The foregoing petition for rehearing is restricted to the grounds specified in Supreme Court Rule 44.2, and is presented in good faith and not for the purposes of delay.

Respectfully submitted,

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Sidney Powell